Provisional

For participants only

21 September 2018

Original: English

International Law Commission

Seventieth session (second part)

Provisional summary record of the 3437th meeting

Held at the Palais des Nations, Geneva, on Friday, 27 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair drew attention to the revised programme of work for what remained of the session, as proposed by the enlarged Bureau, and said that the meeting of the Planning Group originally scheduled for that morning had been postponed until the afternoon of Monday, 30 July 2018. If he heard no objection, he would take it that the Commission wished to adopt the programme of work, as amended.

It was so decided.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VII. Provisional application of treaties (*continued*) (A/CN.4/L.920 and A/CN.4/L.920/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.920.

Title of section C and heading 1

The Chair recalled that, at the end of the previous meeting devoted to the discussion of the draft report, the title of section C and heading 1 had been left in abeyance pending a review of the Commission's relevant practice. The Secretariat, having looked back at the reports produced by the Commission over the previous decade, had determined that the Commission's usual practice was, as noted by Mr. Park, to include the words "on first reading" after "adopted by the Commission". The only exceptions had been made in 2016, when the Commission had decided, for reasons unknown, not to include the words "on first reading" when adopting its draft conclusions on identification of customary international law and its draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Furthermore, the Commission's consistent practice was to stop after the words "on first reading" and not to continue with the words "at its nth session". He therefore proposed that the title of section C should read: "Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission on first reading."

It was so decided.

Mr. Tladi said that, according to his understanding, it was not the Commission's practice to use the words "draft guidelines constituting the". Heading 1 should be amended accordingly.

Mr. Murphy proposed that heading 1 should read: "Text of the draft Guide to Provisional Application of Treaties."

It was so decided.

Paragraph 11

Mr. Llewellyn (Secretary to the Commission) said that, in the interests of consistency with the title of section C and heading 1, the paragraph should be redrafted to read: "The text of the draft Guide to Provisional Application of Treaties adopted by the Commission on first reading is reproduced below."

Paragraph 11, as amended, was adopted.

The Chair, recalling that the Commission had already adopted the draft guidelines on provisional application of treaties on 31 May 2018, said he took it that the Commission wished to adopt document A/CN.4/L.920, as amended, as a whole.

The portion of chapter VII of the draft report contained in document A/CN.4/L.920, as amended, as a whole, as adopted.

The Chair invited the Commission to consider the portion of chapter VII of the draft report contained in document A/CN.4/L.920/Add.1.

Title of section C and heading 2

The Chair said that the title of section C and heading 2 should be amended to reflect the changes made to the title of section C and heading 1 in document A/CN.4/L.920.

It was so decided.

Paragraph 1

Mr. Park proposed the insertion of a footnote at the end of the paragraph to explain the relationship between the commentaries in document A/CN.4/L.920/Add.1 and those contained in the Commission's report on the work of its sixty-ninth session (A/72/10), which were different. The footnote would read: "The commentaries reproduced in 2017 in the report of the International Law Commission are replaced by this current set of commentaries."

Mr. Gómez-Robledo (Special Rapporteur), supported by **Mr. Tladi** and **Mr. Nolte**, said that, while he did not object to adding such a footnote, he did not think it necessary. It seemed logical that the commentaries had been modified since 2017, not only because two new draft guidelines had been added since then but also because a number of comments made in the plenary meetings of the Commission and in the Drafting Committee had prompted him to make changes.

Mr. Tladi said that the footnote proposed by Mr. Park might even cause confusion in the context of other topics, as it implied that commentaries adopted on first reading did not automatically replace previous sets of commentaries.

The Chair said that the paragraph should be amended to reflect the changes made to paragraph 11 of document A/CN.4/L.920.

Paragraph 1 was adopted on that understanding.

General commentary

Paragraph (1)

Mr. Murphy said that he had communicated a number of proposed changes that he viewed as non-substantive directly to the Special Rapporteur, as he had the impression that such proposals did not need to be raised in plenary meetings of the Commission.

Mr. Tladi, supported by **Mr. Ouazzani Chahdi**, said that changes that appeared minor might nevertheless have substantive implications. Given the difficulty in determining what was substantive and what was not, he would caution against the approach taken by Mr. Murphy.

Mr. Gómez-Robledo (Special Rapporteur) said that, while he understood the concern expressed by Mr. Tladi, it had been his intention to incorporate several non-substantive proposals from Mr. Murphy and Mr. Nolte at a later stage with the help of the Secretariat. If, however, the prevailing opinion was that he should read out each of the proposals in plenary meetings of the Commission, he would do so.

Mr. Ouazzani Chahdi asked whether the language groups would have an opportunity to examine the proposals that had been submitted directly to the Special Rapporteur.

The Chair said that he agreed with Mr. Tladi. The issue of transparency had become a sensitive one within the Commission, so, even if it took some time, the full Commission should be made aware of any and all proposed changes to the text. He therefore suggested that the Special Rapporteur should read out, in English, the proposals put forward by Mr. Murphy and Mr. Nolte. The language groups would meet at a later stage to amend the other language versions to reflect the text as adopted in English by the Commission.

Mr. Gómez-Robledo (Special Rapporteur) said that, in the second sentence of paragraph (1), Mr. Murphy had proposed that the word "They" should be replaced with "States, international organizations and other users". In the last sentence, Mr. Nolte had

raised a concern about the use of the conjunctions "and/or". He therefore proposed to delete the words "and/or to the solutions".

Sir Michael Wood said that, although he agreed with the approach suggested by the Chair, he was not sure that all proposed changes needed to be discussed by the Commission meeting in plenary. Proposals to correct spelling mistakes and minor punctuation issues could, in his view, be submitted directly to the Secretariat. That said, however, the amended version of the last sentence, as proposed by the Special Rapporteur, did not seem to constitute an improvement.

Mr. Nolte said that he had sent some proposals directly to the Special Rapporteur with the aim of facilitating the adoption of the report, and not in the expectation of having them accepted in a manner that was not fully transparent. His preference would be to end the last sentence after the words "existing rules" or, failing that, to replace "and/or" with "and".

Mr. Park said that he agreed with the approach suggested by the Chair. In the last sentence, he would be in favour of inserting the word "possible" before "solutions", as he was not convinced that it was accurate to state that the draft guidelines reflected existing rules.

Sir Michael Wood said that he would prefer to simplify the last sentence by replacing the words "and/or to the solutions that seem" with "and". Stating that the draft guidelines were consistent with existing rules was not the same as claiming that they all reflected existing rules.

Mr. Gómez-Robledo (Special Rapporteur) said that the insertion of the word "possible" would significantly weaken the paragraph. The purpose of the last sentence was simply to make clear that whatever answers users found in the Guide were consistent with existing rules.

Mr. Rajput said that the words "seem most appropriate" were liable to cause confusion. Throughout the general commentary, the Commission should refer to "existing rules and contemporary practice".

Mr. Nolte said that he agreed with the proposal made by Sir Michael Wood. The decision of whether to refer to "existing rules" and "contemporary practice" concurrently should be made on a case-by-case basis.

The Chair said that he was also in favour of a paragraph-by-paragraph approach. It should be left to the Special Rapporteur to determine whether a proposal was substantive and ought to be brought to the attention of the Commission meeting in plenary.

Sir Michael Wood said that, in the revised general commentaries to the draft conclusions on identification of customary international law and the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the equivalents of footnote 1 had been elevated to the status of separate paragraphs in order to emphasize them. He proposed that the same method should be applied in the document under consideration through the insertion of a new paragraph (2) to replace footnote 1.

The Chair, supported by **Mr. Gómez-Robledo** (Special Rapporteur), said that, although he agreed with the proposal to make footnote 1 a paragraph of the commentary, it should, in his view, become a new paragraph (1), as it was applicable to all the paragraphs in the general commentary, including existing paragraph (1).

Mr. Saboia proposed that the content of the footnote should be placed in a new paragraph 2 under heading 2.

Sir Michael Wood, supported by **Mr. Nolte**, said that the text of the footnote would be better placed in the body of the general commentary, to which it applied, rather than in the subsection under heading 2, which was of a procedural nature.

Mr. Murphy said that the footnote would be somewhat stark as a separate paragraph. His preference would be for it to become the new last sentence of paragraph (1).

Sir Michael Wood said that the whole point of elevating the footnote to the status of a separate paragraph was for it to be stark and thereby capture the attention of readers from outside the Commission.

Mr. Tladi said that Mr. Murphy's proposal was a good compromise. Although it was wise to highlight the importance of the general commentary, care should be taken not to overemphasize it and create the impression that it was as important as the draft guidelines themselves. After all, some issues that Commission members had been unable to agree upon for inclusion in the draft guidelines had instead been addressed in the general commentary.

The Chair suggested that, to resolve the impasse, the Commission should defer to the wishes of the Special Rapporteur.

Mr. Murphy said that he would be prepared to accept that suggestion, but that the same principle should then be applied to all the Commission's projects.

Mr. Rajput said that, in the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and the draft conclusions on identification of customary international law, the wording concerned constituted paragraph (2), which followed the general introduction in paragraph (1). He suggested that the same should be done in the current case.

Mr. Saboia said, for the record, that he was prepared to agree with either proposed solution but shared Mr. Tladi's concerns about emphasis being put on the commentaries rather than the adopted text.

Mr. Nolte said that, while he agreed with Mr. Saboia and Mr. Tladi that the commentaries should not be overemphasized, they should not be underemphasized either, or outsiders might not realize the extensive deliberations that the Commission had engaged in during their drafting. In his opinion, the wording of footnote 1 implied not that the commentaries had the same status as, but rather that they elucidated, the draft guidelines. He proposed that the wording might usefully be taken up, or at least alluded to, in all the Commission's outputs.

The Chair, noting that the wording indicated that the footnotes were to be read together with, not interpreted in the light of, the commentaries, said he took it that the Commission wished to move footnote 1 to the text of the commentary as a new paragraph (1) and that its wording should be taken up in the two remaining topics under discussion during the current session. However, the decision to do so would not affect the Commission's future texts.

Mr. Llewellyn (Secretary to the Commission) said that the new paragraph (1) under the title "General commentary" would thus read: "As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries."

Mr. Rajput said that, although he would prefer to see that wording inserted as paragraph (2), he would be prepared to accept the current proposal if the special rapporteurs for the two other topics agreed to include the same wording in their draft texts.

The Chair, noting the agreement of the two special rapporteurs concerned to that proposal, said that the wording would be followed in their texts. He took it that the Commission wished to move footnote 1 to a new paragraph (1) and renumber subsequent paragraphs and footnotes accordingly.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that Mr. Nolte had made a number of proposals, with which he agreed, for changes to paragraph (2). The first proposal was to delete the whole of the second sentence because its content was included in the corresponding guideline. The second proposal was to remove the second quotation from the

third sentence for purposes of clarity. The third proposal was to insert, after "to build trust" in the fourth sentence, the words "in advance of entry into force".

The Chair suggested that the Commission might like to consider each of the proposals in turn. He saw no objection to the first proposal and therefore took it that the Commission wished to delete the second sentence of the paragraph.

It was so decided.

Sir Michael Wood said that, in respect of the second proposal, he considered the final phrase of the second quotation in the third sentence to be somewhat misleading, as it emphasized that a treaty or provisions could be applied for "a limited period of time" whereas, for instance, the General Agreement on Tariffs and Trade, which fell into the category concerned, had been applied for over 40 years, a period that could not be defined as "limited".

Mr. Nolte said that the phrase "for a limited period of time" should be understood in the legal sense, the actual duration of such application in no way affecting its temporary nature. He would like to see the first quotation, rather than the second, removed from the third sentence, because it mentioned the "application of and binding adherence to a treaty's terms", which to a certain extent pre-empted the Commission's later wording in the relevant draft guideline.

Mr. Park said that he would favour retaining both quotations because of the importance of the sources from which they were taken. For the purposes of clarity, he proposed replacing the word "and" between the two quotations with "or".

Mr. Murphy said that the issue was whether the Commission wished to communicate to the reader at the outset the general context of the provisional application of treaties. The current wording indicated that the sources cited were not the only ones that offered definitions. In that regard, it might be helpful to include the words "by writers" after "the concept has been defined". He agreed with Mr. Park's proposal but would accept whatever the Special Rapporteur preferred.

Mr. Rajput said that the value added by the third sentence was to be found in its references to the literature. However, its meaning was the same as that of the first sentence of the paragraph and so it was not really necessary; one solution might be to include the quotations in the footnotes. To avoid creating confusion about the meaning of provisional application, the Commission should not rely on the literature for definitions. He was not in favour of Mr. Park's proposal to replace "and" with "or", as that would introduce the possibility of choosing between definitions from the literature.

Sir Michael Wood, agreeing with Mr. Rajput, said that the source given in footnote 2 was an important one. Footnote 3, which had disappeared with the deletion of the second sentence of the paragraph, could, together with the references in footnotes 4 and 5, be usefully included in footnote 2, which would thus bring together a number of key academic works. The third sentence of paragraph (2) could then be deleted, which would avoid the Commission being seen to be endorsing specific definitions at the outset of its work.

Mr. Gómez-Robledo (Special Rapporteur) said that his intention in beginning the general commentary with references to the literature had been to provide a sense of the direction of the guidelines. He agreed with Mr. Park's proposal, but also welcomed that of Sir Michael Wood. He therefore proposed that the third sentence of paragraph (2), with the words "by writers" added after "The concept has been defined" and including the two citations with their corresponding references, should be converted into a single footnote.

Sir Michael Wood said that the marker for the proposed new footnote should be placed at the end of the first sentence of paragraph (2). As an expansion of the current footnote 2, the new footnote would refer to the sources given in current footnotes 2 and 3, and then include the sentence containing the two quotations, as the Special Rapporteur had proposed, and their references, which were currently given in footnotes 4 and 5.

The Chair said that, as he saw no objections, he took it that the members agreed to the proposal.

It was so decided.

The Chair, referring to the third proposal presented by the Special Rapporteur, said that, as he saw no objections, he took it that the members agreed to the inclusion, in the fourth sentence of paragraph (2), of the words "in advance of entry into force" after "to build trust".

It was so decided.

Mr. Murphy said that he had also made a proposal in respect of paragraph (2), that the word "essentially" should be deleted from the final sentence because it might raise questions about the voluntary nature of the mechanism.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with the proposal.

The Chair said that, as he saw no objections, he took it that the members agreed to Mr. Murphy's proposal.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Nguyen, noting that much of the wording of the first sentence of paragraph (3) was the same as that of paragraph 1 under heading 2, proposed that the sentence should be deleted.

Mr. Park, referring to the second sentence of paragraph (3), said that not all the draft guidelines reflected existing rules of international law. For example, progressive development had been mentioned in the context of draft guideline 7, on reservations, and in the context of international organizations. He therefore proposed inserting the words "and progressive development" in the second sentence, between "existing rules" and "of international law".

Mr. Rajput said that, rather than the words "and progressive development", he would prefer to insert "and contemporary practice", which was mentioned in paragraph (1).

Mr. Nolte said that he did not consider draft guideline 7 or draft guideline 9, to which he presumed Mr. Park was also referring, as examples of progressive development. Rather, they reflected existing rules of international law. However, it was true that there was no practice involving reservations in respect of the provisional application of a treaty. Nonetheless, that did not mean that such a reservation would not be in conformity with or would not reflect international law. He was of the view that the guidelines did reflect international law and he did not see any instance of progressive development in them. Adding the suggested words would cast doubt on the significance of every other guideline and undermine their purpose.

Sir Michael Wood said that he agreed with Mr. Rajput that paragraph (1) could serve as inspiration, and suggested that the second part of the second sentence should read "the draft guidelines are consistent with existing rules of international law and contemporary practice".

Mr. Gómez-Robledo (Special Rapporteur) said that he would caution against Mr. Park's proposal, as there were still divergent opinions within the Commission about the guideline on reservations, and it might be decided on second reading to omit any reference at all to reservations. He agreed that the first sentence of paragraph (3) might be redundant and could be deleted. The current second sentence could then be reformulated appropriately, as proposed by Mr. Rajput and then Sir Michael Wood, but without any further additions.

Mr. Nolte said that he would propose amending the second part of the sentence to read "the draft guidelines elaborate upon existing rules of international law, in the light of contemporary practice".

Mr. Park said that, although he did not wish to start a discussion with Mr. Nolte on the definition of "existing rules of international law", he wondered how it was possible to speak of an existing rule, *lex lata*, without there being any practice. Without sufficient

practice, it would simply be *lex ferenda*. In respect of Mr. Rajput's proposal, he was somewhat hesitant, as he was not sure what "contemporary practice" was in the given context, particularly with respect to reservations. While he would endorse most of the guidelines, there was as yet no contemporary practice on some of them.

Mr. Petrič said that the original formulation of the second sentence was a little unclear and he could understand the concern expressed by Mr. Park, Mr. Rajput and others. It might be helpful to redraft the first part of the sentence in such a way as to stress the fact that the guidelines were not legally binding, although they reflected existing rules of international law.

Mr. Šturma said that he was unsure whether the word "reflect" was the most appropriate choice.

Mr. Nolte said that it appeared that the Special Rapporteur had used the word "reflect" precisely because the draft guidelines themselves were not binding but did elucidate existing rules of international law. With regard to Mr. Park's remark about *lex lata* and *lex ferenda*, there were certain provisions of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, such as common article 64, which had never been applied. The absence of practice, however, did not mean that article 64 was not a rule of international law.

Mr. Ouazzani Chahdi proposed inserting the word "may" before "reflect" [*les projets de directive peuvent constituer le reflet de règles de droit international existantes*].

Mr. Gómez-Robledo (Special Rapporteur) said that the proposal made by Mr. Ouazzani Chahdi appeared to seek to diminish the scope and authority of the draft guidelines as a whole. Although care had been taken not to accord the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations the status of customary law, it could not be denied that the draft guidelines had taken inspiration from international law. Discussions of such fundamental questions had already taken place during plenary meetings of the Commission and should not be reopened. It would be preferable to keep the original wording of the sentence rather than add a verb that would weaken the draft as a whole. The Commission could discuss the point further if the draft guidelines were criticized in the Sixth Committee.

Mr. Murphy said that an alternative course of action would be to delete the second sentence entirely. The third sentence already captured the idea that the draft guidelines were, for the most part, grounded in the 1969 and 1986 Vienna Conventions on the law of treaties. To address Mr. Park's concern, the words "which they try to clarify and explain, and on the practice of States" could be changed to "which they try to clarify, explain and develop, based on the practice of States".

Sir Michael Wood said that he agreed with Mr. Murphy's suggestion to delete the second sentence. The third sentence, even without the changes proposed by Mr. Murphy, captured the meaning that was intended in the second sentence.

Mr. Nguyen said that he supported the proposal by Sir Michael Wood. He himself wished to propose using the words "most appropriate contemporary practice", which appeared in paragraph (1), since the draft guidelines did not reflect all contemporary practices, nor did they reflect new developments in international law.

Mr. Gómez-Robledo (Special Rapporteur) said that he preferred to retain the second sentence, believing that it was important to state from the outset that the draft guidelines were not intended to be legally binding. It was unclear, moreover, where Mr. Nguyen was suggesting the words "most appropriate contemporary practice" should be placed.

The Chair said he took it that members wished to delete the first sentence of paragraph (3); the second sentence, as amended by Mr. Nolte, would be retained in accordance with the preference of the Special Rapporteur; and the third sentence would remain unchanged.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Rajput said that the last sentence of paragraph (4) should be deleted because it gave the impression that States and international organizations would have to contract out of the draft guidelines.

Mr. Nolte said that he read the last sentence as saying that it was not necessary for States and international organizations to contract out.

Mr. Gómez-Robledo (Special Rapporteur) said that, at the specific request of a number of Commission members, and in order to emphasize the voluntary nature of provisional application, he had rephrased the sentence that had appeared in chapter V of the Commission's report to the General Assembly on the work of its sixty-ninth session (A/72/10). It was important that the general commentary should stress from the outset that provisional application was eminently flexible.

In the first sentence of paragraph (4), the word "to" should be inserted before the word "cover". In the second sentence, the words "that is consistent" should be replaced with "a general approach is consistent" and the word "keep" should be replaced with "acknowledge".

Mr. Murphy said that, in order to address Mr. Rajput's concern regarding the third sentence, the phrase "the Guide allows States and international organizations to set aside" could be amended to read "the Guide recognizes that States and international organizations may set aside".

Sir Michael Wood proposed that at the end of the third sentence, the words "certain draft guidelines" should be amended to read "the draft guidelines".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy proposed inserting the word "certain" before the word "terms" in the second sentence. He said that while the practice of the Economic Community of West African States (ECOWAS), referred to in footnote 11, was a good example of the extensive use of provisional application of treaties, it was not related to the differing use of terms. The footnote should therefore be moved to an earlier location in the commentary; it could perhaps become part of footnote 7.

Sir Michael Wood said that it would be preferable to move the numeral marker for footnote 11 to the end of the second sentence of paragraph (5).

Mr. Saboia said that he had doubts about the appropriateness of the term "definite entry into force", which appeared between quotation marks in the second sentence. Entry into force was a term that already conveyed the notion that the procedure for a treaty's entry into force had been completed.

Mr. Gómez-Robledo (Special Rapporteur) said that, in order to address Mr. Saboia's concern, the quotation marks could be removed from the term "definite entry into force" and the word "definite" could be placed in italics for emphasis. In that way, the term would be differentiated from "provisional entry into force" in the same sentence, which was a direct quote from a number of ECOWAS treaties.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Nolte proposed that the word "will" should be inserted in the first part of the second sentence of paragraph (6), so that it would read "Those draft model clauses will reflect best practices".

Mr. Gómez-Robledo (Special Rapporteur) said that Mr. Murphy had proposed inserting the words "it is anticipated that" before the words "this Guide" in the first sentence.

Mr. Park said that it would be preferable to use the words "desirable practices" rather than "best practices" in the second sentence.

Mr. Jalloh (Chair of the Drafting Committee) said that he was unsure whether the changes proposed by Mr. Nolte and Mr. Park were necessary. Following the discussion in the Drafting Committee, it had been his understanding that some States were interested in receiving guidance. Model clauses reflecting best practices could be useful in that regard since practices varied significantly. "Best practices" was standard terminology and, since the Commission's intention was to determine "best" rather than "desirable" practices, the formulation ought to be maintained.

Mr. Vázquez-Bermúdez said that he agreed with Mr. Jalloh that the wording "best practices" should be retained. Since the Commission intended to draft model clauses but had not yet completed that task, the beginning of the second sentence could perhaps be amended to read "Those draft model clauses would reflect best practice", with "practice" in the singular.

Mr. Nguyen said that, in the first sentence of footnote 16, reference should be made to the footnote that had been moved from paragraph 5 to paragraph 7 of chapter VII of the report, as contained in A/CN.4/L.920, which reproduced the text of the eight draft model clauses so far considered by the Commission.

Mr. Jalloh said that he wished to clarify that, although the draft model clauses had been mentioned in plenary, the Drafting Committee had not yet debated their substance or adopted any of them. In his view, the first sentence of footnote 16 captured the situation accurately.

Mr. Gómez-Robledo (Special Rapporteur) said that it was his intention to work on the draft model clauses in an informal manner at the Commission's seventy-first session, rather than wait until the second reading of the draft guidelines at its seventy-second session.

Mr. Murphy said that he supported Mr. Nguyen's proposal, as it would draw Member States' attention to the footnote which contained the draft model clauses. The reference to "the annex" in footnote 16 might be confusing for a reader of the report, since it seemed to point to an already existing annex, whereas in fact the annex would likely be issued at the Commission's seventy-first session.

The Chair said that he too supported the proposal to include a reference to the footnote containing the draft model clauses.

Ms. Galvão Teles (Rapporteur) proposed replacing the phrase "reproduced in an annex" in the first sentence of paragraph (6) with "which are to be included in an annex", for clarity's sake. As for footnote 16, she would be in favour of either removing the reference to "an annex containing such draft model clauses" or inserting a cross-reference, as proposed by Mr. Nguyen.

The Chair suggested that the Commission should entrust the Secretariat and the Special Rapporteur with making the necessary changes to the paragraph and to the related footnote.

Paragraph (6), as amended, was adopted on that understanding.

Paragraph (7)

Mr. Murphy proposed aligning the language of paragraph (7) with the amended language of paragraph (6), so that it would now read: "It is anticipated that a selected bibliography will be reproduced in an annex." That said, it was not clear whether the Special Rapporteur's intention was in fact to include the bibliography as an annex or to issue it as a separate document. He himself was not convinced that a bibliography should be part of the Commission's outcome. A bibliography would be current only as of the date the

Commission completed its work on the topic, and would likely become dated fairly quickly. Another option might be to publish the bibliography as a separate document, similar to what the Commission had done in its work on the topic "Identification of customary international law".

Sir Michael Wood said that, as Special Rapporteur on the topic of identification of customary international law, he saw the bibliography related to that topic as a stand-alone document. Noting that the bibliography drawn up for the current topic was extensive, he said that bibliographies did not have to be given the same treatment from one topic to the next.

Mr. Nolte said that the inclusion of a bibliography had to do with how the Commission positioned itself *vis-à-vis* the academic world. While a bibliography might suggest authority, there was a difference between those commentaries in which academic commentary was cited in the footnotes, as in the Commission's work on the current topic, and others, in which it was not. He was not opposed to the suggestion that a bibliography might be published as a separate document; making it an integral part of the Commission's commentary, on the other hand, would signal that the Commission gave certain books more authority than others, something about which he would have reservations.

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (7) had been drafted prior to the issuance of his fifth report; as recommended by the Secretariat, he had included the bibliography as an addendum to that report (A/CN.4/718/Add.1). In paragraph (7) he had simply wished to draw the reader's attention to the fact that a bibliography existed as a separate document. He would not be opposed to simply providing such information in a footnote. It was not his intention that the bibliography should form part of the Guide, for the reasons already set out by colleagues.

Mr. Nolte said that if paragraph (7) were to remain as drafted, the Commission would have to examine and discuss the bibliography more closely; he had done so and would have a number of changes to propose. Therefore, while he sympathized with the Special Rapporteur's intentions, he was of the view that the bibliography should not be given more authority by making it look like it was part of the commentary.

The Chair suggested that paragraph (7) should be deleted and that a reference to the bibliography as a stand-alone document should be inserted in paragraph 5 of chapter VII of the report (A/CN.4/L.920).

Paragraph (7) was deleted on that understanding.

The general commentary to the draft Guide to Provisional Application of Treaties, as a whole, was adopted.

Commentary to draft guideline 1 (Scope)

Paragraph (1)

Mr. Nolte proposed deleting the first part of the second sentence, "In establishing the intended parameters of the draft guidelines", which was not clear and seemed unnecessary.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Murphy, noting that footnotes 18 and 19 reproduced the content of article 25 of the 1969 and 1986 Vienna Conventions on the law of treaties, respectively, proposed moving that material to footnotes 8 and 9, which referred to the first mention of those articles. He further proposed that footnote 17 should be moved to the very end of the first sentence of the paragraph.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with both the amendments proposed by Mr. Murphy, subject to their verification by the Secretariat.

Paragraph (3) was adopted on that understanding.

The commentary to draft guideline 1, as a whole, as amended, was adopted, subject to verification by the Secretariat.

Commentary to draft guideline 2 (Purpose)

Paragraph (1)

Paragraph (1) was adopted with minor drafting changes.

Paragraph (2)

Mr. Murphy, drawing attention to the first two sentences of paragraph (10) of the commentary to draft guideline 9, in which the Commission acknowledged the fact that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart, suggested that it would be apt to move those sentences to the paragraph (2) currently under consideration, where the 1986 Vienna Convention was mentioned for the first time.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft guideline 2, as a whole, as amended, was adopted.

Commentary to draft guideline 3 (General rule)

Paragraph (1)

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Mr. Nolte proposed that the last sentence of paragraph (2) was a fitting introduction to the content of paragraph (3) and thus should be incorporated into the latter. In addition, he suggested that, in paragraph (3), the word "existing" in the phrase "a treaty existing among 'negotiating States'" was superfluous and should be deleted. In the penultimate sentence of paragraph (3), he understood that it was the provisional application of certain commodity agreements that extended beyond the termination date. He suggested making that clearer in the text by replacing the phrase "but were extended beyond their termination date" with "but whose provisional application extended beyond their termination date". If that change were to be made, the words "when States extended an agreement that had only been provisionally applied" in the last sentence of paragraph (3) would become superfluous and could be deleted.

Mr. Nguyen proposed that, in the first sentence of paragraph (3), the words "or part of a treaty" should be inserted after the phrase "to provisionally apply a treaty", in order to better reflect the language of article 25 of the 1969 and 1986 Vienna Conventions on the law of treaties.

Paragraphs (2) and (3), as amended, were adopted.

Paragraph (4)

Sir Michael Wood proposed that, in the second sentence, the words "known as" should be replaced with "referred to as". He further proposed that the sentence "The Commission remains of the same view" was superfluous and should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5), as amended, was adopted with minor drafting changes.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Sir Michael Wood said that the modifier "negotiating" in the phrase "negotiating States or international organizations" was too limiting; he proposed deleting it and inserting the word "concerned" after "international organizations".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted with minor drafting changes.

The commentary to draft guideline 3, as a whole, as amended, was adopted.

Commentary to draft guideline 4 (Form of agreement)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted with minor drafting changes.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Nolte proposed that the last sentence of the paragraph should be deleted. While the statement contained therein might hold true from the perspective of an international organization, the Commission was examining the issue from the perspective of the binding character or the establishment of provisional application. Later in the commentary to the guidelines, it was stated that the internal law or rules of an international organization were irrelevant with regard to the binding character or establishment of provisional application. Therefore, the statement that an agreement to establish provisional application must be in conformity with the rules of an organization could create a grave misunderstanding.

Mr. Park said that, in his view, the last sentence of the paragraph constituted a "no-harm" clause.

Mr. Murphy said that he tended to agree with Mr. Nolte's statement concerning the last sentence of the paragraph. He also suggested that a citation in footnote 30 should be updated with newly available publication information.

Mr. Gómez-Robledo (Special Rapporteur) said that in its discussion on the topic of provisional application of treaties, Commission members, in particular Sir Michael Wood, had emphasized that it had to be absolutely clear that any unilateral declaration by a State or an international organization must be accepted by the other States or international organizations concerned. That notion was reflected in the penultimate sentence of paragraph (4). While he had initially seen the last sentence as a necessary supporting statement, he could accept Mr. Nolte's point of view that that sentence might be misleading or even might diminish the importance of the previous sentence, which was the far more meaningful one. He therefore agreed to the deletion of the last sentence of the paragraph.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Nolte said that he would be in favour of replacing the word "clearly", which appeared twice in the paragraph, with the word "verifiably", as it was better to point to evidence, rather than impression.

Mr. Murphy said that he was not opposed to replacing the word "clearly" with "verifiably" the first time it appeared in the paragraph; however, in the second instance, he would suggest simply deleting it, and replacing the word "expressed" with the word "express", so that the end of the penultimate sentence would read "on the condition that it is express". In addition, he proposed that, in footnote 31, rather than citing his own report, the Special Rapporteur should reference existing practice, so that readers of the report could directly consult the source material.

Mr. Park proposed adding a footnote containing examples of existing practice at the end of the third sentence.

Mr. Rajput proposed that, for clarity's sake, the third sentence should be redrafted to read: "Most of the existing practice reflects the acceptance of provisional application in written form."

Sir Michael Wood said that he would be in favour of simply deleting the word "clearly" both times it appeared in the paragraph; he did not support replacing it with the word "verifiably", even in the first instance, as it was not obvious who would be responsible for said verification.

Mr. Gómez-Robledo (Special Rapporteur) agreed with the point made by Sir Michael Wood.

Paragraph (5), as amended and supplemented with a footnote, was adopted.

The commentary to draft guideline 4, as a whole, as amended and supplemented with a footnote, was adopted.

The meeting rose at 1.05 p.m.

Provisional

For participants only

24 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3438th meeting
Held at the Palais des Nations, Geneva, on Monday, 30 July 2018, at 3 p.m.

Contents

Immunity of State officials from foreign criminal jurisdiction

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (A/CN.4/722)

Ms. Escobar Hernández (Special Rapporteur), presenting her sixth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/722), said that in it she had begun to study the procedural aspects of the topic. Unlike in previous reports, no draft articles were proposed for adoption by the Commission. The introduction of the report also differed somewhat from the analogous sections of her earlier reports in presenting a more detailed summary of the Commission's previous work on the topic and discussion thereof by the Sixth Committee of the United Nations General Assembly.

The reasons for including a more detailed treatment of the discussions in the Commission and in the Sixth Committee were the following: (i) debate within the Commission at its sixty-ninth session and the Sixth Committee during the seventy-second session of the General Assembly had been particularly intense on the issue of limits and exceptions to immunity, given the sensitive nature of the issue and the divergence of views; (ii) in addition, many comments had been made on procedural aspects, particularly in respect of guarantees and safeguards, during discussion of her fifth report (A/CN.4/701) and draft article 7 proposed therein; and (iii) some members of the Commission had referred to the need to strike a balance between that draft article and procedural safeguards in explaining their votes when the draft article had been provisionally adopted. The summary in her sixth report was intended to be purely informative, rather than to reopen debate on issues already decided.

Chapter I of the report dealt with general questions relating to the procedural aspects of immunity from jurisdiction. She emphasized that the approach to procedural aspects within both the Commission and the Sixth Committee had varied over time. From an almost exclusive focus on the classic elements of the question — the timing of consideration of immunity, invocation of immunity, waiver of immunity and determination of immunity — discussion had begun to encompass new dimensions, with growing interest in "procedural safeguards" and references to the need to avoid abusive exercise of jurisdiction and politically motivated proceedings against foreign officials and to ensure that such officials were fully covered by the rights and procedural safeguards recognized in international human rights law.

The latter set of issues had acquired particular significance in 2016 and 2017, when the Commission had discussed limits and exceptions to immunity and provisionally adopted draft article 7. Although the Commission had not taken up the call of some members to make adoption of draft article 7 conditional upon the adoption of safeguards, its debates had revealed almost unanimous acknowledgment of the importance of safeguards and the need to tackle that issue. A footnote to the titles of Parts II and III of the draft articles to that effect had been included as a result. Debate within the Commission had been echoed in the Sixth Committee at the seventy-second session of the General Assembly, as outlined in paragraph 33 of her report, and interest in procedural aspects had also been shown during the interactive dialogue that had taken place in October 2017 as part of that year's International Law Week.

The need to analyse the procedural aspects of the topic was beyond doubt, in particular bearing in mind that immunity was claimed in a foreign criminal jurisdiction. The work of the Commission would not have its maximum effect unless adequate answers were provided to the distinctly procedural questions listed in paragraph 35 of her report, which should be considered in the light of the criteria set out in paragraphs 36 to 40 thereof. Essentially, they included the need to take into account the fact that the courts of the forum State were dealing with a foreign element of a specific nature — a State official — whose actions, at least in terms of immunity *ratione materiae*, were "performed in an official capacity"; the need to uphold the principle of sovereign equality in relations between the forum State and the State of the official, balancing the right of the former to exercise its own jurisdiction against the right of the latter to have the immunity of its officials respected; the need to ensure balance between respect for the immunity of State officials and the aim of eliminating impunity for the most serious crimes under international law; and the need to

ensure that any State official subject to the exercise of foreign criminal jurisdiction benefited from the rights and procedural safeguards recognized in international human rights law.

Considering such matters from a procedural standpoint would enable procedural solutions to be found that would ensure security both for the forum State and for the State of the official and reduce political factors and the possibility of abusive or politically motivated exercise of jurisdiction as far as possible. The procedural approach would introduce an element of neutrality, help to build confidence between forum States and the States of officials, and avoid upsetting international relations. It required a broad, comprehensive scope, focusing on the four separate but related sets of issues described in paragraph 41 of her report: (i) the procedural implications for immunity arising from the concept of jurisdiction, in particular with respect to timing, the identification of the acts of the authorities of the forum State that might be affected by immunity, and the consideration of issues related to the determination of immunity; (ii) the procedural elements that had autonomous procedural significance as a result of their direct links to the application or non-application of immunity in a given case, and that served as a first-level safeguard for the State of the official, in particular issues concerning the invocation and waiver of immunity; (iii) the procedural safeguards for the State of the official, in particular mechanisms to facilitate communication and consultation between it and the forum State and to transmit information between the judicial authorities concerned, as well as instruments of international legal cooperation and mutual assistance between the States concerned; and (iv) the procedural safeguards inherent in the concept of a fair trial, including respect of international human rights law.

As explained in paragraph 43 of the report, she considered that the Commission should analyse the effect that the obligation to cooperate with an international criminal court could have on the immunity of State officials from foreign criminal jurisdiction. The issue had been addressed in the fifth report but had not been mentioned in draft article 7 as provisionally adopted because various members of the Commission had suggested that the issue could be better examined by taking a broader perspective that did not concern only limitations and exceptions to immunity. In that regard, she would particularly welcome suggestions on how to tackle the issue in the draft articles.

Information from States on domestic practice and how relevant procedural aspects were regulated at national level would also be welcome, particularly in view of the limited number of replies that the Commission had received to its questions to date.

Chapter II of the report dealt with the first set of above-mentioned issues, in particular the timing of consideration of immunity, the identification of which acts by the authorities of the forum State could be affected by immunity, and the consideration of issues related to the determination of immunity; it took into account the prior analysis set out in the background study by the Secretariat and the reports of the previous Special Rapporteur. The issues covered were closely related to the concept of jurisdiction and could only be understood in that context. She recalled that her second report (A/CN.4/661) had proposed a draft article containing definitions of the concepts of jurisdiction and immunity, which had been referred to the Drafting Committee. The basic elements of the definition of immunity had largely been recognized in the draft articles provisionally adopted, but the definition of jurisdiction remained an open question. While she did not intend to raise the matter again at present, the Commission should reflect on how important its understanding of the concept of jurisdiction was to the topic, particularly when it had a direct effect on the main procedural aspects involved. In that regard, the report focused on an analysis of "when", "what" and "who".

Regarding "when", she emphasized that since the immunity of State officials from foreign criminal jurisdiction was conceived as a procedural barrier to the exercise of jurisdiction, the object of which was to determine the alleged criminal responsibility of the official in question, it was clear that immunity must operate and be considered at an early stage of criminal proceedings or it would lose its *raison d'être*. However, determining what "an early stage" meant was more complex and could not be reduced to the mechanical identification of a specific point in the process. That process could include police investigations, in which judges and prosecutors were not involved; inquiries and

investigations, which they might supervise; and trial. Given the diversity of national procedural legislation, it was impossible to identify the point at which immunity should be considered by simple reference to those stages of the process.

The report therefore not only looked at the identification of a specific procedural phase but also took into account the effect that a particular act could have on the foreign official, which was an approach generally accepted in international practice and jurisprudence. Applying both criteria together, the report concluded that immunity must be considered by the courts of the forum State as soon as they began to exercise jurisdiction, before taking any decision on the merits of the case, and before ordering any binding measure that could affect the foreign official and the performance of his or her official functions. Consequently, the courts must consider immunity at least before investigating, charging or committing the official for trial, and at the latest before the start of the oral hearing. Immunity should also be considered during the inquiry or investigative stage, if it became necessary to order binding measures that could affect the official and the performance of his or her official functions, particularly with regard to pretrial detention, accusations that did not constitute formal charges, or similar precautionary measures. On the other hand, police or judicial actions of a purely investigative nature that did not directly affect the official or the performance of his or her official functions were not affected by immunity, which therefore did not need to be considered by the State authorities during the initial phase of police investigations in which the courts were not involved. The distinction between immunity *ratione personae* and immunity *ratione materiae* could also have a bearing on determining the point at which immunity should be considered, especially as it would be immediately obvious to the courts if they were dealing with a Head of State, Head of Government or Minister for Foreign Affairs.

With respect to "what", she concluded in her report that the acts affected by immunity were the bringing of a criminal charge, a summons to appear before the court as a person under investigation or to attend a confirmation of charges hearing, a decision on the confirmation of charges, committal for trial, a summons to appear as the accused in a criminal trial, a court detention order or an application to extradite or surrender a foreign official. The jurisdictional nature of all of those acts was plain, their purpose being none other than to make it possible for the forum court to exercise its jurisdiction over a given person (in that case the foreign official) in order to be able to decide whether he or she bore criminal responsibility. The exercise of jurisdiction was always inherent in those acts and, for that reason, such acts were necessarily affected by the immunity of State officials from foreign criminal jurisdiction.

However, the same was not true of other kinds of acts that were also examined in the report: certain types of detention and similar acts, especially for the registration of information or arrest warrants in international police cooperation systems; appearances as a witness; and certain precautionary measures that could affect the foreign official or his or her property. There was no simple, universally applicable approach to such acts. Paragraphs 67 to 96 of the report examined each category in detail. Her principal conclusions were that how an act was affected would vary depending on whether immunity *ratione personae* or *ratione materiae* were in play, the former having the greater effect, and that, except in the case of inviolability of the official or his or her property, the above acts would be affected by immunity only if they were coercive in nature, could be imposed on the foreign official and would incontrovertibly affect the ability of the foreign official to perform his or her functions. The question was especially relevant to the potential detention of a foreign official, in which respect she would particularly welcome the Commission's views.

With regard to "who", she said that the issue of determining immunity had been tackled from the perspective both of the State organ in the forum State that was competent to decide on the applicability of immunity in respect of a foreign official and of factors that the organ must consider in reaching its decision in a particular case. She concluded in her report that competence to decide on the applicability of immunity lay with the specific organs whose jurisdiction it would affect. In practice, the decision would ultimately rest with the courts of the forum State, although other bodies, such as public prosecutors, might also need to take decisions if the issue of immunity arose in the exercise of their functions. Such a conclusion would not prevent other State organs from cooperating with the

competent courts by providing them with legal information or opinions, in accordance with the State's domestic legislation. The related issue of whether the State of the official could transmit information to a court in the forum State to assist it in exercising its functions and determining immunity would be covered in her seventh report, in the context of international cooperation and mutual legal assistance.

From a substantive standpoint, the determination of immunity would require the competent body to consider various different factors depending on whether it was determining immunity *ratione personae* or *ratione materiae*, as described in paragraph 108 of her report. Regarding the former, it sufficed for the court to consider whether the State official was a sitting Head of State, Head of Government or Minister for Foreign Affairs. Regarding immunity *ratione materiae*, the court had to assess whether the individual was a State official, whether the acts in question had been performed in an official capacity and during the term of office of the State official, and finally whether the acts fell within any of the categories of crimes under international law to which immunity *ratione materiae* did not apply

She recalled that her plan for future work on the topic was outlined in paragraph 109 of the report. The seventh report would consider the invocation and waiver of immunity, communication between the forum State and the State of the official, the transmission of information by the State of the official to the forum State, international cooperation and mutual legal assistance between the forum State and the State of the official, and other general issues related to the procedural safeguards relevant for both the State of the official and the foreign official concerned. In addition to the issues listed therein, the report would consider the possibility of establishing a means of resolving disputes between the forum State and the State of the official, which would conclude the analysis of procedural matters relating to immunity. She said that she had chosen not to include any draft articles in her sixth report not because the issues discussed did not merit reflection in draft articles but so that the procedural aspects covered in the sixth and seventh reports could be considered together by the Drafting Committee. A complete package of draft articles on procedural aspects would be submitted to the Commission with her seventh report, in 2019.

Finally, she said that the seventh report would conclude her consideration of the questions included in the original programme of work on the topic, giving the Commission a comprehensive basis for adopting a complete set of draft articles. Some definitions proposed in her second report remained pending before the Drafting Committee; they might need to be considered in 2019, when she hoped that the Commission would be in a position to adopt the draft articles on first reading.

Mr. Murase, after thanking the Special Rapporteur for her excellent sixth report, said that the Commission had agreed in 2011 that special rapporteurs should submit their reports at least six weeks prior to the beginning of the session at which they would be considered. He hoped that the Special Rapporteur's future reports would be submitted on time in order to facilitate their translation from Spanish into the other official languages and thus to ensure that all Commission members had sufficient time in which to prepare their statements on the important topic under consideration.

It was puzzling that the Special Rapporteur had not proposed any draft articles in her sixth report. It was particularly regrettable that no draft articles had been proposed to reflect the Special Rapporteur's excellent analysis, in chapter II of the report, of the specific features of procedural safeguards.

He was pleased that draft article 7 had been provisionally adopted by an overwhelming majority in 2017. He had repeatedly emphasized that the project would make no sense without a draft article on exceptions to immunity. As had been noted in 2017, the provisions on procedural safeguards would guarantee the fair and effective operation of draft article 7, although it had been made clear that they were also relevant to the draft articles as a whole.

Reading the sixth report, however, he wondered who would benefit from the procedural safeguards discussed therein. The Special Rapporteur seemed to consider three possibilities: the State to which the official belonged; the forum State in which the official was present; and the official himself or herself. For the first two possibilities, the Special

Rapporteur had employed the concept of "sovereign equality" as a sort of guiding principle. However, he did not believe that "sovereign equality" could be an element of procedural safeguards as commonly understood. It seemed to him to be a matter for international cooperation between the States concerned. In his view, procedural safeguards should be relevant only to the protection of individuals, namely State officials in the context of the topic under consideration.

As the Special Rapporteur noted in paragraph 40 of the report, procedural safeguards could include international human rights law, in particular the provisions of the International Covenant on Civil and Political Rights relating to minimum international standards in criminal proceedings. Those provisions included article 9 on arrest and detention, article 10 on the treatment of suspects and accused persons and article 14 on the right to a fair trial.

As the Special Rapporteur stressed in paragraph 37 of her report, procedural safeguards played an essential role in the application of draft article 7, namely to avoid abusive or politically motivated prosecutions. A related point was the scope of prosecutorial discretion, which he had already discussed in connection with Mr. Kolodkin's third report in 2011 and Ms. Escobar Hernández's preliminary report in 2012. As he had stated on those occasions, control over prosecutorial discretion was an important question in the context of the topic. The Commission needed to ensure that prosecutorial discretion was subject to adequate safeguards in order to prevent its abuse. Most importantly, prosecutors in both international and national criminal systems were required to exercise their discretionary powers in a transparent manner. With regard to national criminal systems, he wished to draw the Commission's attention to paragraph 17 of the Guidelines on the Role of Prosecutors, which stipulated that, in countries where prosecutors were vested with discretionary functions, the law or published rules or regulations should provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution. The most effective means of preventing the arbitrary or aggressive exercise of prosecutorial discretion against foreign Heads of State and other State officials was to establish guidelines for prosecutors in the form of laws or regulations at the domestic level. Conversely, if prosecutorial discretion prevented a State official who had committed a serious international crime from being prosecuted, there should be some mechanism for reversing that decision. Thus, he believed that the Commission should consider how to prevent both forms of abuse of prosecutorial discretion.

Of course, as a general matter, the inherent power of prosecutors should be respected, and prosecutorial discretion *per se* should not be unduly restricted. Japan had a system of "prosecutorial review", which empowered special committees, each composed of 11 randomly selected voters, to overrule a prosecutor's decision not to prosecute. The Commission could recommend that States should adopt a similar control mechanism.

That said, the consideration of immunity and procedural safeguards should not be limited to the prosecution stage. As the Special Rapporteur stressed in her report, the question of immunity should begin to be considered, if not decided definitively, early on in the process, at the investigation stage. In principle, the consideration of immunity was relevant to the entire criminal procedure, including the investigation, arrest, detention, extradition, transfer, prosecution, prosecutorial review and provisional measures of protection, not to mention formal court proceedings, judgments and the execution of those judgments. In any case, it was crucial to ensure that immunity was considered carefully at an early stage of the proceedings in order to avoid confusion at a later stage.

In Japan, as in many other countries, a judge had to issue a warrant in order to authorize an arrest or a period of pretrial detention. A judge would certainly reject any request for a warrant if the suspect in question enjoyed immunity. It was important in that context that the rule on immunity was clear to law enforcement officials, prosecutors and judges. If two international instruments established conflicting rules in that regard, it would create serious confusion on the part of the law enforcement authorities of the forum State.

There should be a State organ designated to provide instructions to law enforcement authorities in the event of any doubt or ambiguity regarding the applicable law. That point

had been exemplified by the 29 July 2011 decision of the High Court of Justice of England and Wales in the *Khurts Bat* case. In Japan, the Ministry of Foreign Affairs had primary responsibility for interpreting international law, and the law enforcement and prosecutorial authorities could turn to that Ministry for advice on individual cases. That mechanism might be similar to the "suggestion of immunity" in the United States, to which reference was made in paragraph 100 of the report. The existence of such mechanisms underscored the importance of the topic: the draft articles would be the basic instrument referred to by the competent authorities in each State.

In that connection, he wished to reiterate his basic position on the topic. Since the beginning, he had taken the view that the Commission should closely follow article 27 (1) of the Rome Statute of the International Criminal Court. If it did not, it would create confusion for law enforcement officials, prosecutors and judges working on cases involving suspects believed to have committed serious international crimes who happened to be high-ranking State officials. It was for that reason that he had emphasized the importance of ensuring that the Commission's draft articles were broadly in line with that instrument.

The Commission had adopted that approach in relation to the topic of crimes against humanity, and it should also have done so in relation to the topic under consideration. Draft article 7, which had been provisionally adopted in 2017, had gone a long way towards remedying the situation by bringing the draft articles closer into line with the Rome Statute. However, even draft article 7 did not fully bridge the gap between the two in terms of the range of State officials covered and that of the crimes included. In 2017, for example, the "crime of aggression" had been excluded from the project. He hoped that efforts would be made to codify a systematic and harmonious set of norms on the topic.

In any event, he hoped that the Special Rapporteur would propose a set of draft articles on procedural safeguards in her following report. Chapter II of her sixth report contained an excellent analysis of such issues as the timing of the consideration of immunity and the material elements to be considered in each procedural phase. He was convinced that the adoption of draft articles on those issues would make it possible to complete the first reading successfully in 2019.

Mr. Tladi said that, although the Special Rapporteur had not proposed any draft articles in her sixth report, it provided a solid basis for discussion, which could lay the ground for draft articles on the procedural requirements relating to immunity, particularly, but not exclusively, in connection with the exceptions thereto. He agreed with Mr. Murase's comments on the timing of the submission of the report. He was taking the floor on the understanding that the debate would not be closed and that, once he had been able to read the report properly and analyse its content, he would have the opportunity to give a more reasoned and possibly more comprehensive statement in 2019. In particular, he would refrain from commenting on chapter II for the time being. He thanked the Special Rapporteur for the useful summary that she had provided of the debate on draft article 7 in the Sixth Committee.

During the debate in the Commission on exceptions to immunity, a number of members had expressed the view that such exceptions should be addressed together with what had been referred to as "procedural safeguards". Mr. Murphy, for example, had referred to the case involving Ehud Barak, which had been dismissed by a court in the United States of America on the basis of a procedure whereby the sovereign State, presumably in the form of the executive, had recognized the immunity of the official in question. As he had himself noted in the subsequent mini-debate, that particular case seemed to pertain not so much to the question of exceptions as to the question of what constituted an official act, which illustrated that procedural issues applied not only to the question of exceptions but also to the entire set of draft articles. It was for that reason that he preferred the terminology chosen by the Special Rapporteur, namely "procedural issues" or "procedural aspects" rather than "procedural safeguards". He feared that, if too close a link was drawn between procedural safeguards and exceptions specifically, they might be used to limit the effects of the exceptions provided for in draft article 7.

As the Special Rapporteur and other Commission members had sought to emphasize, such procedural issues were important in ensuring that immunities, where applicable, were

respected in the interests of safeguarding the stability of international relations. The Commission needed to think carefully about the types of procedure that the draft articles would put in place in order to strike a delicate balance between respecting immunity and ensuring the stability of international relations, on the one hand, and taking into account exceptions to immunity with a view to combating impunity, on the other.

The issue of immunity in respect of grave crimes arose mainly, though not exclusively, in cases of universal jurisdiction. One potentially useful procedural requirement that was not explicitly mentioned in the report was the requirement that any exercise of jurisdiction over an official should be subject to a decision of a higher court. He agreed with the Special Rapporteur that it was for the courts of the forum State to determine whether immunity existed and, if so, whether there were any exceptions to it. Nonetheless, he thought that, as a procedural matter, some weight should be given to the executive and that a court of sufficiently high stature should make the determination. As Mr. Murase had noted, a related matter concerned prosecutorial discretion and the potential impact of its abuse on the stability of international relations. Presumably, the sending State would be required to introduce similar procedural guarantees, although it would probably be better to refer to the State of the official in question rather than the sending State.

He continued to oppose the language that the Special Rapporteur had proposed for paragraph 3 of draft article 7, which the Commission had not adopted, and rightly so in his view. The draft articles and commentaries adopted thus far made it clear that the Commission's work on the to[illegible]ic as a whole was without prejudice to treaty regimes, including, he believed, the Rome Statute. He saw no need to revisit that particular point, as States in the Sixth Committee were generally content with the conclusion that the Commission had reached in that regard.

The Chair said that, at the following session, Mr. Murase and Mr. Tladi would be offered a second opportunity to comment on the Special Rapporteur's sixth report.

The meeting rose at 4.10 p.m. to enable the Planning Group to meet.

Provisional

For participants only

24 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3439th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 31 July 2018, at 10 a.m.

Contents

Immunity of State officials from foreign criminal jurisdiction (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (*continued*) (A/CN.4/722)

The Chair invited the Commission to resume its consideration of the sixth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction.

Mr. Nolte said that, as the translated versions of the report had been made available so late, he had not had time to fully analyse it and prepare a comprehensive statement. He would thus limit his comments to one part of the report and address the others at the next session. The sixth report was an interim report in several respects: it covered only one part of the procedural aspects of the topic, it did not propose any new draft articles, and it did not address the relationship between the procedural and substantive aspects of the topic. However, he understood that the Special Rapporteur would deal with those aspects in her seventh report.

The proposed order of work provided the Commission with an opportunity, at the current session, to collectively reflect on future work on the topic without being under pressure to take decisions. He would have preferred to undertake the reflection more informally, for example in a working group, and explore possible avenues for overcoming the division among members that had resulted from the debate and recorded vote on draft article 7 at the previous session. However, he accepted that the Special Rapporteur would rather have at least a partial debate on the sixth report in plenary meetings to help her prepare the seventh report, with the aim of arriving at a consensual outcome on the topic.

With that common goal in mind, he would make a number of remarks inspired by the motto for the Commission's seventieth anniversary: "Drawing a balance for the future". In his view, a good future could only be achieved by properly taking the past into account. He did not wish to suggest that the Commission should reopen the debate on draft article 7 at the current stage, but the question of whether it reflected existing customary international law or was a proposal for progressive development of international law would have to be reviewed at the following session if the Commission wished to achieve a consensual outcome. Most States were asking for an answer to that very question, as had been evident during the debate on the matter in the Sixth Committee in 2017, a summary of which was provided in paragraphs 13 to 20 of the report.

As the summary showed, very few States were even close to believing that draft article 7 reflected customary international law. Only one — Italy — had expressly stated that it did, and 21 States had explicitly rejected the claim. He agreed with the Special Rapporteur that the division within the Commission was reflected in the comments of States in the Sixth Committee, which had been fairly evenly divided between those favourable towards and those critical of draft article 7. The significance of that division among States went far beyond mere statistics.

Most States that had expressed a positive opinion about draft article 7 had suggested that they considered it to be a proposal for the progressive development of international law (*lex ferenda*) and not codification of existing law (*lex lata*). As the Special Rapporteur noted in paragraph 18, many States on both sides had called on the Commission to clarify whether the proposal represented codification or progressive development. In addition to the 12 States cited by the Special Rapporteur in footnote 68, Belarus, Japan, the Russian Federation, Sri Lanka and Thailand had also made a request for clarification.

As noted in paragraph 20, many States had expressed concern that the Commission was split and had resorted to a vote, and had urged it to move forward cautiously with a view to achieving consensus. He therefore agreed with the Special Rapporteur that the Commission should carefully consider its future approach to the topic.

Another reason for clarifying the legal character of draft article 7 was that the question would have to be addressed once the outcome of the Commission's deliberations on procedural aspects were linked to substantive rules, such as draft article 7. If, for example, procedural rules regarding cooperation between the State of the official and the forum State were proposed, States would need to know whether the Commission

considered that they must be followed as a matter of existing law or should be accepted and further developed by States, and whether any exceptions to the immunity of State officials *ratione materiae* could be applied only after the procedural rules had been followed. The procedural and substantive aspects of the topic were therefore interconnected. Nonetheless, he agreed that it made sense for the Commission to focus on procedural aspects at the current session.

To maximize the chances for a constructive and consensual outcome, it was necessary to distinguish between general procedural requirements that applied to all situations in which the immunity of a State official was at issue and specific procedural safeguards that applied to situations in which an exception to such immunity, as in draft article 7, was at issue. The report dealt only with the first category. As he had been unable to properly digest the text in the short time available, he could not address the detailed considerations provided by the Special Rapporteur in that respect. However, he wished to offer a few suggestions regarding the second category. Indeed, a very large majority of States agreed that, if there was to be a provision along the lines of draft article 7, there must also be effective procedural safeguards. In his view, a possible provision might read:

The exercise of national criminal jurisdiction based upon an exception to immunity *ratione materiae* as described in draft article 7 is only permissible if:

(1) The foreign official is present in the forum State;

(2) The evidence that the official committed the alleged offence is fully conclusive;

(3) The decision by the forum State to pursue criminal proceedings against a foreign official is taken at the highest level of Government or prosecutorial authority; and

(4) The forum State cooperates with the State of the official. This duty to cooperate means that the forum State must:

(a) Notify the State of the official if it intends to pursue criminal proceedings and inquire whether the State of the official wishes to waive the immunity of its official; and

(b) If the State of the official is able and willing to submit the matter to prosecution before its own courts, the forum State must transfer the proceedings and extradite the alleged offender to the State of the official or, if agreed between the States concerned, transfer him or her to a competent international court or tribunal; or, alternatively, if the State of the official is not able or willing to submit the matter to prosecution before its own courts or before an international court or tribunal, the forum State must, before permitting the continuation of the prosecution by its national instances, offer to be ready to transfer the alleged offender to a competent international court or tribunal if such a court or tribunal has jurisdiction.

The jurisdiction of an international criminal court or tribunal in such cases might result from its statutory basis or from a specific agreement between the forum State and the State of the official, if such an agreement was compatible with the statute of the international court or tribunal and if such international court or tribunal was willing and able to take the case.

He hoped that those specific procedural safeguards for the application of an exception to immunity *ratione materiae* in cases of alleged international crimes would be generally acceptable to the Commission members and, if so, that they could also contribute to reaching an agreement on other aspects of the topic. However, if the Commission wished to achieve a consensual outcome, it must also make it clear that the rule envisaged in draft article 7 did not reflect existing customary international law but was a proposal for the progressive development of international law. The members could then set aside their differences regarding whether or not there was a "trend" in either direction. In his view, the Commission had two options. It could either state that the draft articles on immunity of State officials from foreign criminal jurisdiction were intended to become a treaty or reformulate draft article 7 and couch it as a recommendation, for example by replacing the

word "shall" with "should". It would not be sufficient to indicate in the commentaries that draft article 7 contained elements of progressive development and of codification and that it was not always easy to distinguish between the two. In the case of draft article 7, it was possible to make that distinction.

Mr. Hassouna said that, while he had been fortunate to have access to an earlier unofficial translation of the Special Rapporteur's insightful and thorough sixth report, it was to be hoped that the next report on the topic, in all language versions, would be made available at an early stage so as to allow members to thoroughly study its content. The current report, which addressed procedural aspects of immunity, complemented the discussion of exceptions and limitations to immunity in the fifth report and contributed to a more complete and comprehensive understanding of the topic. He was confident that, with the Special Rapporteur's guidance, the Commission could strike the appropriate balance between the need to preserve immunity as a principle of sovereign equality and the interests of the international community in combating impunity for the most serious international crimes.

Immunity of State officials from foreign criminal jurisdiction was a topic of great importance, as it concerned not only States and their practices in foreign relations, but also courts, which would undoubtedly turn to the Commission's final product for guidance. The topic was also politically sensitive and therefore required careful treatment and attention to State practice. An important recent development in that regard had been the request by African States to the General Assembly to seek an advisory opinion on the topic. The Special Rapporteur should be commended for thoughtfully summarizing and responding to issues raised in the Sixth Committee in 2017.

Although States had expressed great interest in the topic in Sixth Committee debates, few had responded to requests for information on their national practice. Fewer than 10 States had provided written comments on their treatment of procedural aspects of immunity, and no African or Asian States had contributed thus far. Perhaps the forthcoming meeting of the Asian-African Legal Consultative Organization might provide the opportunity for those States to formulate their positions on the topic.

In the Sixth Committee debate, States had continued to call on the Commission to label aspects of its proposals as codification or progressive development. The Commission should discuss its response to those requests, and other comments on its methodology, at the next meetings of the Working Group on methods of work. As the topic related to others under consideration, including crimes against humanity and peremptory norms of international law (*jus cogens*), as well as universal criminal jurisdiction, which had recently been added to the long-term programme of work, the Commission should obviously maintain a common approach so as to ensure consistency and harmony among the topics.

He welcomed the Special Rapporteur's comprehensive approach to procedural aspects of immunity. She suggested revisiting the definition of criminal jurisdiction proposed and discussed in previous reports, but while she correctly noted that the concept of jurisdiction inherently related to the procedural aspects of immunity, formulating such a definition might not be necessary in the current context. Certain considerations discussed in chapter II of the report, such as the adoption of binding decisions that imposed coercive measures on a State official, seemed to be most relevant for ascertaining the reach of criminal jurisdiction within the general concept of jurisdiction. The functional definition developed in the report was, in his view, sufficient for the discussion of criminal jurisdiction with respect to procedural aspects of immunity.

The Special Rapporteur thoughtfully analysed three categories of procedural questions: when immunity should be considered by a forum State; what acts of the forum State affected immunity; and which State organ should determine whether immunity applied. With respect to the first question, of timing, the Special Rapporteur expanded upon the conclusion reached by the former Special Rapporteur, Mr. Kolodkin, that immunity should be considered either at the early stage of court proceedings or even earlier, at the pretrial stage. He agreed with the current Special Rapporteur's conclusion that courts must consider questions of immunity before imposing any obligations on the foreign official that might lead to coercive measures and impede the proper performance of his or her State

functions, which would be consistent with the jurisprudence referenced in paragraphs 53 to 56. He welcomed her references to the International Court of Justice and to an extensive list of national court decisions, including new cases that had not been available at the time of the previous Special Rapporteur's reports. With respect to the reference to the Special Court for Sierra Leone, the Special Rapporteur should clarify the nature of the Court and the relevance of mixed or hybrid courts in her future work. All the cases cited related to the determination of immunity *ratione personae*. In that regard, it might be useful to consider the ongoing case concerning the *Enrica Lexie Incident* (*Italy v. India*) before the Permanent Court of Arbitration, which related to the exercise by India of criminal jurisdiction over Italian marines.

The discussion on timing referred to immunity in general terms, whereas the Special Rapporteur often distinguished between immunity *ratione personae* and *ratione materiae* elsewhere in the report. He would welcome clarification as to whether the conclusions in paragraph 63 applied to both types of immunity. It would be appropriate for determinations on immunity to be made before a forum State took measures that impinged on a foreign official's ability to operate in his or her official capacity. However, given the distinctions between immunity *ratione personae* and *ratione materiae*, both with respect to other procedural aspects and exceptions and limitations, further consideration of that issue might be warranted.

The Special Rapporteur concluded that immunity must be considered before bringing charges against or prosecuting a foreign official. In his second report on the topic, however, the former Special Rapporteur had found that the commencement of criminal proceedings against a foreign official would not violate the official's immunity, so long as the proceedings did not impose any obligation upon that person under the law of the forum State. It should be clarified whether instituting criminal proceedings alone, in the absence of measures imposing obligations on the official, could nevertheless impede the performance of official functions.

The Special Rapporteur's conclusion that questions of immunity did not need to be considered ahead of or during investigations by a forum State was convincing and supported by previous reports on the topic, scholarly works and policy. The distinction that should be emphasized in that regard was not between investigation prior to entering charges and those measures that came after criminal proceedings began, but whether the measures imposed obligations on the foreign official concerned and, in particular, whether those obligations would interfere with the official's State functions. That distinction was an important procedural safeguard against politically motivated prosecutions of foreign officials. Clear procedures for prosecutors and other actors in the investigation phases would be of great value in enhancing transparency and fairness and limiting abuse of discretion.

With respect to the second category — the material element — it should be clarified whether the phrase "acts affected by immunity" referred to acts which were precluded by or which violated immunity. The Special Rapporteur distinguished between immunity *ratione personae* and *ratione materiae* but, again, the determining characteristic of acts which violated the immunity of a foreign official was whether they imposed obligations on the official. A forum State that imposed obligations on a foreign official, whether it be to appear as witness, present documents or information, or not leave the forum State, would violate the immunity of that official. According to the report, the result would be the same whether immunity *ratione personae* or *ratione materiae* applied, since in either situation immunity precluded enforcement of those measures that prevented the foreign official from carrying out his or her State functions.

The only case in which a forum State imposing obligations on a foreign official would not necessarily violate immunity seemed to be where the official enjoyed immunity *ratione materiae* and was summoned to appear as a witness. In paragraph 86, the Special Rapporteur explained that a foreign official in that situation would only be precluded from appearing as witness if the summons to appear "is binding and his or her testimony touches on this category of acts". In his view, the binding character of the summons alone might conflict with the foreign official's immunity *ratione materiae*. There could be situations in which obligating a foreign official to testify might restrict the performance of his or her

official functions, even if the subject matter of the testimony did not relate to acts performed in an official capacity.

The discussion of who determined whether immunity applied was similar to the Special Rapporteur's treatment of the issue in the fourth report. He supported her analysis of the general competence of courts from the forum State in determining immunity. The role played by a State's high court should be emphasized and explained in the commentary. The Special Rapporteur's reference to the written comments provided by States on that question was appreciated, and might encourage States to participate more actively to the debate on the topic. In his comments on the fourth report at the Commission's sixty-seventh session, he had stated that, in limited instances, through treaty interpretation, the International Court of Justice had served as a check on the exercise of broad State authority to impose its criminal jurisdiction on another State's official. However, it was problematic that, without the Court's intervention, interpretative authority would be left either to States themselves or to regional bodies. A general concern regarding that question had been raised by a number of States in the Sixth Committee, including Austria, which had proposed the creation of an international dispute resolution mechanism to prevent abuse and politically motivated prosecutions. Naturally the Special Rapporteur could not analyse mechanisms that did not yet exist, but the oversight role left for the International Court of Justice and regional bodies in the existing system could be clarified.

With regard to future work, he supported the Special Rapporteur's intention to address the possible impact of the obligation to cooperate with an international criminal court on the immunity of State officials from foreign criminal jurisdiction and related procedures. Her plan for future work covered all the topics addressed in the concept paper circulated at the previous session, which in his view would comprehensively conclude the discussion of procedural aspects. He welcomed the plan to include a draft article on procedures in the seventh report, which should complement those previously adopted on limitations and exceptions. The distinctions between immunity *ratione personae* and *ratione materiae* should be reflected in their respective procedural rules.

He agreed that the topic was politically sensitive and at times controversial. However, it was the Commission's role to proceed in the face of disagreement in order to find solutions and bridge the gap between divergent views. It should not shy away from pursuing the codification and progressive development of difficult topics when they reflected the pressing concerns of the international community, when they were sufficiently ripe for consideration and when they served the needs of States. It was for those reasons that the Commission had begun its work on the topic, and for those reasons that he supported the continuing efforts of the Special Rapporteur as she navigated difficult waters.

Mr. Grossman Guiloff said that the Special Rapporteur's sixth report contained a comprehensive analysis of the procedural aspects of the topic, and provided a helpful summary of the Commission's work and States' reactions to the topic to date. Although States unsurprisingly held a range of views on the procedural aspects of the topic, it was not an exaggeration to say that they all considered the topic important. There was also some agreement as to the focus on procedural safeguards. As the Special Rapporteur pointed out in paragraph 29, since 2011, the focus of Commission members had shifted somewhat towards the need to establish procedural safeguards to prevent the politicization and abuse of criminal jurisdiction in respect of foreign officials. A similar approach had been taken in the Sixth Committee, as noted by the Special Rapporteur in her fifth report. Although the sixth report did not contain draft articles, it was well researched and would provide constructive guidance for the Commission's discussions. He intended to make provisional comments on the report that he would develop further in the course of the coming year.

The discussion of the topic demonstrated the need to achieve a balance between the principle of sovereign equality of States and the rejection of impunity for the most serious crimes, namely those listed in draft article 7. In his opinion, the balance sometimes tipped too far in one direction or the other, with consideration given only to efforts to combat impunity or only to the prevention of abuse. As the Special Rapporteur noted in paragraph 39, that balance was particularly relevant in the case of immunity *ratione materiae* in respect of the crimes set out in draft article 7. As mentioned in the report, one difficulty might be the limited specialized procedural doctrine on the topic. The analysis of the topic

by the Commission was an opportunity to provide certainty for States on a variety of points, including assurances that jurisdiction would not be exercised in an abusive or politically motivated manner, and that immunity would not undermine the necessary struggle against impunity.

As the Special Rapporteur pointed out in paragraph 33 of the report, the concerns expressed by States in the Sixth Committee at the seventy-second session of the General Assembly reflected the debate within the Commission, which was to be expected. States were well aware of the discussions that had taken place on the topic and the different issues at stake. Their suggestions for the Commission's consideration included the usefulness of the "prosecution or waiver of immunity"; the establishment of a mechanism for the settlement of disputes between the forum State and the State of the official — a very important issue, since assertions of exception would inevitably provoke debate; and the establishment of procedural safeguards to ensure that the exercise of jurisdiction would not undermine due process. The Special Rapporteur proposed that those issues should be addressed and considered it necessary to establish a proper mechanism for communication between States, particularly when an issue of exception was at stake.

As pointed out by the Special Rapporteur, adequate mechanisms for communication between the State of the official and the forum State were necessary to enable forum State courts to take into account whether the State of the official had an interest in protecting the immunity of its official. Such communication was also required, according to paragraph 36 of the report, in order to "evaluate factors such as whether the individual can be considered a 'State official', whether the act giving rise to the potential exercise of jurisdiction can be considered to have been 'performed in an official capacity', and whether the official was acting 'in exercise of official functions' at a given moment". He agreed with the Special Rapporteur's statement in paragraph 37 that issues of concern should be addressed in a manner that afforded an element of neutrality, creating conditions of trust between the forum State and the State of the official. Communication channels and the creation of a climate of trust were two important topics that could be further developed and analysed in the seventh report in respect of, *inter alia*, the timing and manner of communication.

It was necessary to emphasize that a broad approach should be taken to the analysis of the procedural aspects of immunity, as pointed out by the Special Rapporteur in paragraph 41. It was not possible to give absolute answers to every question raised in respect of the topic under consideration; sometimes the special circumstances of each case would be relevant and must be taken into account. He agreed with the Special Rapporteur that it was important to study the effect that the obligation to cooperate with an international criminal court might have on the immunity of State officials from foreign criminal jurisdiction and the related procedures. *Mutatis mutandis*, it was important for the Special Rapporteur to consider the procedural implications that were created for States that had ratified treaties which established that the crimes defined in them could be committed only by public officials, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Convention had been ratified by 164 States and had given rise to many problems in respect of exceptions to immunity of jurisdiction. Many crimes involving torture were linked to the crimes listed in draft article 7; for States that had ratified the Convention against Torture, the issue of immunity had a different connotation than for States that had not ratified it. Similarly, the International Convention for the Protection of All Persons from Enforced Disappearance established that enforced disappearance could be perpetrated only by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State. Since States had drawn up treaties establishing that certain crimes could be committed only by public officials, the Commission needed to ascertain all the consequences deriving from such explicit treaty obligations. It had been clear from the very beginning that the object and purpose of those two conventions was to regulate certain types of official conduct, namely acts carried out under colour of law. It was worth noting that those conventions also established the duty to try or to extradite.

Additionally, it would be of interest to consider the procedural implications of crimes that constituted serious breaches of the Geneva Conventions, in particular when they were committed by public officials. That aspect of the topic should be analysed in the light

of the Rome Statute of the International Criminal Court and the relevant doctrinal practice. While special circumstances, including treaty-based obligations, should be taken into account, the Commission needed to see if it could develop or establish some general principles. It would be most useful if the Commission could provide States with principles and guidelines on how to approach the topics identified by the Special Rapporteur in paragraph 41, including, *inter alia*, the determination of immunity, the point at which immunity should be considered, and which categories of acts were affected by immunity.

With respect to the timing of the consideration of immunity, he took note of the Special Rapporteur's position, as described in paragraph 49 and elsewhere. He agreed that immunity against foreign jurisdiction must begin to operate in the early stages of the process; there was no need for a country to waste time proceeding with a case when immunity would apply. It was important to note that the determination of immunity should be made early in the process for reasons of procedural economy. Clearly, immunity should be determined before the merits of the case were considered. As noted by the Special Rapporteur, that position had been confirmed by the International Court of Justice in *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which it was stated that questions of immunity were preliminary issues that must be resolved in *limine litis*. The matter had also been addressed within national jurisdictions, as in the cases cited by the Special Rapporteur in paragraph 56 of the report.

As noted in paragraphs 61 and 62 of the report, the fact that immunity was a preliminary issue did not imply that it had immediate application at the investigative stage. However, he had doubts about whether immunity could be disregarded at that stage. It was obvious that an investigation could be a very complex matter involving private actors, with potential distinctions to be made between the public and private domains. In that respect, it was important to take note, as the Special Rapporteur did in paragraph 58, of the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), in which they held that commencing an investigation on the basis of which an arrest warrant might later be issued did not of itself violate the principles of the immunity and inviolability of a minister. In his opinion, the Commission should be very careful about making a general statement as to whether the investigative phase was excluded or included. If an investigation was informed that a Head of State had clear immunity, there would be serious issues to consider.

In his view, the Special Rapporteur had carried out a thorough analysis of both international jurisprudence and national State practice, concluding in paragraph 56 that the consideration of a foreign official's immunity from jurisdiction was directly related to the time at which the court of the forum State must take a binding decision with regard to that person. However, given the limited practice in the matter, he tended to believe that immunity could be invoked at any stage, including during the investigation, indictment or prosecution stage of proceedings. In paragraph 63, the Special Rapporteur stated that there was nothing to prevent courts of the forum State from considering immunity at a later stage, especially during an appeal. That seemed to indicate that the appeal was an appropriate stage at which to consider the question of immunity. In his view, the appeal stage was too late for such consideration to take place. He would appreciate clarification from the Special Rapporteur on that point.

With regard to procedural guarantees, concerns expressed by States included the need to ensure that a State official who might be affected by the exercise of foreign criminal jurisdiction benefited from all the procedural safeguards recognized under international law, particularly international human rights law. Certain rights of the official might be affected even before the foreign jurisdiction had taken a decision on applicability, as pointed out by the Special Rapporteur in paragraph 40. Therefore, it was important to establish the proper guarantees of due process for any official over whom a foreign criminal court was exercising, or attempting to exercise, jurisdiction.

Exceptions to immunity were among the issues considered by the International Criminal Police Organization (INTERPOL) when assessing requests for Red Notices. He encouraged the Special Rapporteur to make a more in-depth analysis of both Red Notices and Blue Notices issued by INTERPOL. He attached a great deal of importance to the letter

on the question of immunity sent to the Codification Division by the Director of the Office of Legal Affairs of INTERPOL in 2010, despite the fact that parts of it had since been overtaken by new developments. It was important to understand, from a practical point of view, the norms applied by INTERPOL in respect of immunity. INTERPOL made a distinction between private and public actions: following a request from an international tribunal, in 1994, the General Assembly of INTERPOL had concluded that: "Political power can only be exercised within the limits of the law, and that includes international law ... Consequently, the offences referred to in the Tribunal's Statute cannot have been committed in the exercise of political power; they can only have been committed outside of such power and the offender bears personal responsibility for them. Offences committed by politicians must therefore be assessed to determine whether the political or the ordinary criminal law aspect is predominant, in the same way as offences committed by other people." The issue was, however, more complicated; INTERPOL had not applied the official/private capacity test in respect of requests from international tribunals such as the International Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda. The test was applied in respect of requests sent by one country against a former State official of another country whose acts (for example, the ordering of a military operation) had clearly been carried out in an official capacity. In such cases, INTERPOL would generally apply article 3 of its Constitution to ensure that the Organization did not intervene in an inter-State dispute or otherwise compromise its neutrality. The test was also applied in respect of requests sent by one country against a former State official of another country who might enjoy immunity under international law, namely a former Head of State, Head of Government or Minister of Foreign Affairs. In such cases, INTERPOL would deny the request if the country of the individual concerned protested against the request, since such a protest was understood to be an indication that the protesting country considered the relevant acts to be official in nature.

INTERPOL had recognized, however, that its practice could create serious problems, including by application of the exception of political acts. INTERPOL had highlighted as an example a situation in which a former President of one country was sought by another country for committing an act of genocide while in office. In such cases, the only way to bring the person to justice before the national courts of a foreign country was to create a legal fiction similar to the one created by the General Assembly of INTERPOL in 1994, namely to view the person's acts of genocide as private. All those matters required further study: there was extensive practice on them, including recognition of the complications, and he encouraged the Special Rapporteur to look further into the issue.

As the Special Rapporteur had noted, procedural protections for State officials were particularly relevant in the area of immunity. Red Notices put out against State officials would need to be deleted from the INTERPOL database when immunity was recognized, as in, for example, the case of Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea. However, INTERPOL had in some cases retained Red Notices against officials who allegedly had immunity, for example in the case of the terrorist attack on the Argentine Israelite Mutual Association in Argentina, in which Red Notices had been retained in respect of a number of Iranian State officials. Some Latin American State officials or former State officials had been the subject of Red Notices for crimes such as enforced disappearance and crimes against humanity. He intended to share with the Special Rapporteur the details of a number of such cases involving Chile, Argentina and other countries.

With regard to appearing as a witness, covered in paragraphs 80 to 89 of the sixth report, he was in general agreement with the Special Rapporteur's analysis. She rightly noted, for example, that any measure of a binding nature summoning a Head of State, Head of Government or Minister for Foreign Relations to appear as a witness would be affected by immunity from foreign criminal jurisdiction. He also agreed with her that the same conclusion would not necessarily apply to summonses addressed to foreign officials enjoying only immunity *ratione materiae*. He welcomed the attention paid by the Special Rapporteur to the question of access to documents, and he agreed with her that a request for a State official to surrender documents might be affected by immunity from jurisdiction *ratione materiae* if the request was binding or related to acts performed by the official in an

official capacity. State legislation aimed at insulating officials from domestic legal action with regard to official acts might provide some insight in that respect. There were numerous State norms containing provisions to the effect that information not in the public domain, whether secret, restricted or confidential, could not be the object of a summons in any circumstances.

In connection with precautionary measures, with regard to the title to property, he agreed with the Special Rapporteur that such public officials as a Head of State, Head of Government or Minister for Foreign Affairs enjoyed immunity from execution. However, as noted in paragraph 94, property belonging personally to a Head of State and located in the territory of a foreign State could not be subject to any measure of execution except to give effect to a final judgment rendered against such Head of State. The Special Rapporteur could usefully analyse further the conceptual consequences of that distinction for the purposes of other public officials, since even in the case of a Head of Government the application of a sentence involving his or her personal property that had *res judicata* was an important exception. As noted by the Special Rapporteur, the forum State could take provisional measures over personal property while the legality of the acquisition was being established. It would also be interesting to have more data on the exceptions to immunity with regard to the illegal acquisition of property in juxtaposition with the immunity provided for crimes against humanity. If, in the case of property, it was possible to provisionally attach the property while the legality of the acquisition was being investigated — even in the case of a Head of State — there could perhaps be some consequences that applied in the case of crimes against humanity in terms of people's lives and physical and psychological integrity.

With regard to the determination of immunity, he agreed with the Special Rapporteur that the courts of the forum State would be competent to give a definitive view on that issue, although it would also be possible for organs other than judicial bodies to inform the decision on the applicability of immunity from criminal jurisdiction that a given foreign official might enjoy, since executive bodies often had more expertise in foreign relations. However, such decision-making should be isolated, to the extent possible, from political influence, so that a judicial body always had the final say. That decision-making process depended heavily on the structure of the court system within the forum State, including the forum State's appeals process. He wondered if there was a general State practice leaning towards courts of higher rank, such as the national or federal courts, to determine whether or not immunity applied. He agreed with Mr. Tladi that the determination of immunity should be made at the higher — if not the highest — judicial levels. Generally speaking, a matter of foreign relations involving State officials such as ambassadors or heads of State was adjudicated in the highest court. It would be interesting to know to what extent it was possible to identify whether that had generated a customary rule.

He agreed with Mr. Murase that the public prosecutor's discretion would need to be scrutinized if the prosecutor was instilled with the authority to determine immunity. However, he did not believe that the Japanese example of citizen review of the prosecutor's decision would always be appropriate; if the prosecutor's discretion was to be reviewed, it would be better for such review to be conducted through the forum State's appeals process. Perhaps the determination of immunity by a court could be reviewed by an appeals court prior to final judgment, as in the United States with interlocutory appeals. That way, the appeal on determination of immunity could be expedited, thus avoiding the wastage of resources related to the trial process before a decision was handed down, only to be appealed.

He agreed with the Special Rapporteur's analysis in paragraphs 106 and 107 of her report regarding the validity of the information provided by the forum State and the State of the official regarding the official's status and whether the acts performed by the official were to be considered as having been performed in an official capacity. However, the final determination should be made by the courts of the forum State.

It would have been useful for the report also to cover existing possibilities for recourse to the International Court of Justice or other international mechanisms provided for by treaties, as there would necessarily be disputes on such matters and the ultimate

safeguard was certainty as to how a dispute could be settled. He suggested taking an inventory of such mechanisms. Sixty-six States had already accepted the jurisdiction of the Court, so that if there was a dispute about exceptions to immunity, there was already a mechanism of judicial determination. In addition, there were many treaties, such as the American Treaty on Pacific Settlement, or Pact of Bogota, that established dispute settlement mechanisms. It would be useful to assess how many States — and which ones — did not have a mechanism to settle disputes when they arose, and to encourage States to turn to higher courts in such cases. It would be interesting to consider, in the context of the current topic, the idea put forward by Sir Michael Wood during the Commission's debate on the topic "Peremptory norms of general international law (*jus cogens*)", namely, that a State disputing an exception to immunity could propose submitting the case to the International Court of Justice, and that rejection of that offer would have consequences for the determination of an act's legality. After all, there was no better safeguard than the option of recourse to the International Court of Justice.

Regarding chapter III of the report, entitled "Future workplan", he applauded the Special Rapporteur's determination that the Commission should complete its deliberation of the topic with her seventh and last report on the topic, which would take into consideration the comments made by Commission members. He welcomed her thorough research thus far, especially given the vast scope of the topic, which brought together multiple aspects of international law.

In conclusion, he commended the Special Rapporteur for her valuable analysis of the immunity of State officials from foreign criminal jurisdiction, a topic that was of crucial importance and at the heart of the Commission's purpose in clarifying and balancing international standards.

Mr. Saboia said that he welcomed the Special Rapporteur's sixth report, which addressed procedural issues related to immunity; although the previous Special Rapporteur's work on the topic, his third report in particular, had contributed to Commission members' understanding of such issues, he had not proposed any action to be taken on the basis thereof.

Bearing in mind that, if there were exceptions to immunity *ratione materiae*, adequate procedural measures that were commensurate with draft article 7, adopted by the Commission at its previous session, must be in place, the Commission must now look beyond the issues already addressed by the Special Rapporteur and her predecessor in their reports, in order to examine guarantees that might prevent the abusive resort to exceptions to immunity. At the same time, as the current Special Rapporteur had pointed out, those issues were important to the forum State, against whose jurisdiction immunity was to be invoked, as well as to the State of the official concerned.

The suggestions made by a number of Commission members regarding, *inter alia*, how to establish certain limitations on prosecutorial discretion without jeopardizing prosecutors' independence and the importance of decisions on immunity being taken by higher courts were sensible; perhaps the experience of the International Criminal Court and the relationship between the Prosecutor and Pre-Trial Chambers of the Court might provide good examples in that regard. The fact that such procedures were dealt with under national law could, however, create difficulties for the Commission if it were to issue recommendations.

He noted the acknowledgement by the Special Rapporteur that there was limited available doctrinal material or jurisprudence on the procedural aspects of immunity of State officials and, moreover, that during the Commission's debate on the topic at its sixty-third session, some members had expressed the opinion that it was too early for in-depth consideration of the procedural aspects of immunity, as the Commission had not yet reached an agreement on the substantive elements mentioned in the second report. He further noted that the Special Rapporteur's current report underlined the gradual shift in recent years, within both the Commission and the Sixth Committee, from an emphasis on definitions, acts, phases and other strictly procedural aspects regarding situations in which immunity arose, to an emphasis on the need to avoid the politicization and abuse of criminal jurisdiction in respect of foreign officials and a focus on safeguarding the

sovereign equality of States. While he shared the view expressed in paragraph 31 of the report, according to which the consideration of such safeguards was an important aspect of the Commission's deliberations on the topic, that did not mean that any kind of procedural condition should be accepted.

The Special Rapporteur rightly argued that adequate procedural measures could offer more security to both the forum State and the State of the official and could minimize the abusive exercise of jurisdiction against an official of a foreign State. It would also contribute to enhancing trust between the concerned States. Procedural safeguards should, moreover, adequately cover the official's rights, as emphasized in the report. The ultimate goal was to strike a balance between, on the one hand, preservation of sovereign equality among States and the stability of international relations and, on the other, the values and interests of the international community as a whole in fighting immunity in respect of the most serious crimes of international concern.

In addressing the scope of the procedural aspects of immunity, the Special Rapporteur had drawn up a list of issues that must be considered for a comprehensive analysis of the matter; he noted that in the oral presentation of her report, the Special Rapporteur had more explicitly referred to the rights and guarantees recognized under international human rights law. Although the latter half of the list, covering (a) the category of procedural guarantees for the State of the official and the mechanisms aimed at facilitating communication and consultation between the forum State and the State of the official and other forms of cooperation to be applied between the two States, and (b) the procedural safeguards inherent in the concept of a fair trial, was not dealt with in the Special Rapporteur's report, he welcomed them as "second-generation" procedural issues that could be given further consideration.

In her report, the Special Rapporteur concluded that immunity must be considered by the courts of the forum State at the earliest opportunity, when they began to exercise their jurisdiction and before they delivered any judgment on the merits of a case. Regarding the investigation stage preceding a court order, the situation was less clear, given the diversity of the authorities and regimes involved. The Special Rapporteur was of the view that it would not be sensible to block investigations at that stage, because, *inter alia*, it might involve other persons not having the status of foreign official or not benefiting from immunity; a similar position had been adopted by the previous Special Rapporteur. However, measures during the investigation stage that involved coercion, such as summons and precautionary measures, should require an examination of the issue of immunity. The important factor, as stressed by the Special Rapporteur in her report, was that immunity must be considered before any measure that was coercive or that might impede the full exercise of an official's State functions was taken.

Referring to the Special Rapporteur's detailed analysis of the categories of the acts by the forum State that were affected by immunity — in relation to which he expressed appreciation for the information provided by Mr. Grossman Guiloff on INTERPOL — he said that the Special Rapporteur drew useful distinctions between the concepts of immunity and inviolability and between immunity *ratione personae* and *ratione materiae*, and provided a helpful analysis of whether the acts of the authorities negatively affected the unimpeded discharge of official acts by the official concerned. Such distinctions were relevant but complex and it remained to be seen how they might be translated into rules.

He welcomed the final part of the report, on the determination of immunity, which dealt with questions such as which organs of the forum State were competent to take decisions regarding immunity and how such processes worked.

Although no draft articles had been submitted as part of the Special Rapporteur's report, the latter would help the Commission make progress in considering procedural issues and thus, following the Special Rapporteur's seventh report, the Commission might be able to conclude its review of the topic and adopt the draft articles on first reading at its seventy-first session. However, for that to be possible, there would need to be sufficient time allocated before and during the debate to consider the topic.

Mr. Šturma, noting that discussion of the Special Rapporteur's seventh report would carry over into the Commission's seventy-first session, said that he wished to make

some preliminary remarks, which he hoped would prove useful to the Special Rapporteur in drafting her seventh report. The report currently under consideration was generally useful and contained many references to State practice and international and national case law, even if not all the information provided was directly related to procedural aspects of immunity. He would not comment on the first part of the report, which referred to draft article 7 and the debates of the Commission and of the Sixth Committee on that article.

He agreed that the subject matter of the sixth report — procedural aspects of immunity of foreign officials — concerned the most important issues relating to the topic. It was precisely those aspects and the matter of procedural safeguards that could contribute to achieving a consensus within the Commission. Noting that the report was merely an introduction to procedural aspects and to the concept of jurisdiction and procedural aspects, he said that in terms of methodology, it was important to deal separately with the general concept of jurisdiction, including the State's basis for jurisdiction, and the issue of the institutions that were competent to exercise criminal jurisdiction of a State in practice.

The Special Rapporteur stated that, based on the principle of sovereign equality, the jurisdiction of the State of the official should be the preferred option, provided that the exercise of such jurisdiction was effective. In that connection, it was important, especially when dealing with international crimes, to be able to refer to a number of basic objective criteria for assessing such effectiveness. He suggested that the Special Rapporteur should develop such criteria before analysing other procedural aspects. That was jurisdiction in the most general sense, to determine which State — the forum State or the State of the official — should exercise its criminal jurisdiction in a given case.

Regarding the four dimensions of the procedural aspects of immunity, the Special Rapporteur stated that in order to analyse them, it was necessary to establish a definition of the concept of jurisdiction. Nevertheless, she did not refer to a definition, since a decision on the draft definition proposed in her second report was still pending within the Drafting Committee, but instead relied on a methodology involving just two basic aspects on which there was supposedly consensus: the "preliminary nature" of the issue of immunity from jurisdiction; and the characteristics of acts that do not give rise to immunity from jurisdiction. Regarding the first aspect, he agreed that the general rule should be that the determination of immunity was made prior to the trial phase, which would be consistent with the preliminary nature of such immunity. The second aspect, however, involved the expansion of the scope of application of immunity from jurisdiction, since, depending on the characteristics of the so-called constraining act of authority, it could also affect those acts that had taken place during the pretrial investigation stage. The problem was that, depending on the legal system of a given State, such "acts of authority" carried out by jurisdictional authorities, or even by tax or law enforcement authorities, might or might not be subjected to the intervention of a judge. In that sense, it would be useful to analyse how it was possible to ensure that the State of the official, including in the aforementioned cases, could respond in time and invoke immunity from jurisdiction, in the case of immunity *ratione materiae*, or confirm immunity, in the case of immunity *ratione personae*.

The types of acts affected by immunity also depended on the scope of the concept of jurisdiction. According to the report, the concept covered not only the jurisdiction exercised by jurisdictional bodies — the courts — but also acts performed by officials and other bodies — the public prosecution service and the police. That scope was important in the context of acts performed during the pretrial phase. Once a trial had begun, immunity from jurisdiction would be understood to affect all acts, without prejudice to the effects of an act. While that might appear obvious, it should be stated clearly and explicitly in the report.

It was useful to draw a distinction between a criminal investigation into a situation and investigative procedures in respect of a single person, as had been done by the International Criminal Court. On the one hand, the investigation could involve a great many different people. On the other, only investigative procedures in respect of a single person had the potential to raise the issue of immunity.

In view of the foregoing, the discussion centred on what acts performed outside the trial phase, such as the preliminary investigation or police actions, were also affected by

immunity. In that regard, pursuant to the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) and *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), immunity affected only binding acts that imposed coercive measures on officials, and obligations that, if unfulfilled, gave rise to coercive acts that had an effect on the exercise of their functions.

It was true that the detention of officials who enjoyed immunity *ratione personae* could occur outside or prior to a trial and that it was their personal inviolability that would be affected. Nevertheless, one might ask to what extent the act of detention itself, in being performed by bodies such as the public prosecution service or the police, could be considered an "act of authority" through which they "exercised jurisdiction". With that in mind, could it be argued that a foreign official who enjoyed jurisdictional immunity *ratione materiae* was also protected from such "acts of jurisdiction"?

Regarding the appearance of a foreign official as a witness, the Special Rapporteur referred to the Order of 17 June 2003 on the request for provisional measures in *Certain Criminal Proceedings in France* (*Republic of the Congo v. France*) with the aim of demonstrating that, in respect of senior officials, a summons to appear or testify was not contrary *per se* to immunity from criminal jurisdiction, but only when the summons was not mandatory and thus did not give rise to coercive measures. The Court's analysis in that case concerned whether the summons to appear issued by the French court would cause "irreparable harm" to the Republic of the Congo that warranted the introduction of provisional measures. One might wonder, however, whether the effect of immunity from criminal jurisdiction could be brought about without it being necessary to reach the level of "irreparable harm". In any event, he agreed that the situation differed from that of officials who enjoyed only immunity *ratione materiae*.

The Commission should be very careful about stating that public prosecutors — who were empowered to conduct pretrial proceedings without the involvement of a judge so as to gather evidence and assess whether or not to prosecute — might have the power to decide on the applicability or otherwise of immunity.

With any judicial act, such as a summons to appear at the trial of a third party, there was a need to include the necessary safeguards to allow for an appeal.

As to the determination of immunity, cooperation mechanisms between the judicial body and other bodies of the forum State, such as the Ministry of Foreign Affairs, and the State of the official should not, under any circumstances, imply that the judge was free from the obligation to justify his or her acceptance or rejection of an opinion or information that he or she had received.

With regard to the future workplan, he largely agreed with the Special Rapporteur. It would be helpful to analyse and, subsequently, propose a possible communication mechanism between the forum State and the State of the official based on the principles of subsidiarity and complementarity as set out in the Rome Statute.

He hoped that, in 2019, the Commission would be in a position to adopt, on the basis of the Special Rapporteur's seventh report, the relevant draft articles.

Mr. Huang said that, like previous speakers, he regretted that the translations of the Special Rapporteur's sixth report had been made available too late for most Commission members to study the report properly. As far back as 1996, the Commission had stated that all reports by Special Rapporteurs should be available to members of the Commission some weeks before the commencement of the session, to enable study and reflection. He hoped that members would never again have to discuss a report the day after receiving it, as such a situation ran counter to scientific rigour, prevented members from discharging their duties in an effective way and undermined the Commission's work in the long run.

He welcomed the Special Rapporteur's suggestion, in paragraph 20 of the report, that the Commission might wish to consider the question of its decision-making system in general and as it affected the current topic in particular. However, he also wished to reiterate his dissatisfaction over the Commission's hasty adoption of draft article 7 at its sixty-ninth session, despite strong objections from some members. The adoption had not

only deviated from the Commission's principle and fine tradition of acting, to the extent possible, by consensus when considering major legal issues, but had also been criticized by Member States in the Sixth Committee. At the event held in New York in May 2018 to commemorate the seventieth anniversary of the Commission, the Chair of the Sixth Committee, Mr. Burhan Gafoor, had said:

> One of the unique things about the Sixth Committee is that it has so far worked on the basis of consensus. I have been an advocate of consensus. In the context of the Sixth Committee, preserving the working method of earning consensus and avoiding putting things to a vote precisely because I think it provides [a] solid foundation ... In the Sixth Committee, there was [a] temptation to put something to a vote on some topics. We did our best to avoid it because I still believe there is virtue in building [a] very strong foundation [for] consensus.

Some Commission members might argue that the Commission and the Sixth Committee were two different bodies and that the former did not necessarily need to adopt the same set of rules of procedure as the latter. But it was helpful to recall an assertion made by the Commission itself on the subject of consensus. In 1996, at its forty-eighth session, the Commission had discussed its decision-making procedures and had concluded that:

> At present the Commission and its subsidiary bodies attempt to reach consensus, and there is no doubt that as a general rule this is right. When decisions ultimately come to be taken, again every effort should be made to reach a consensus, but if this is not possible in the time available, a vote may have to be taken, perhaps after a "cooling off period" to allow time for discussion and reflection.

The Commission had further concluded that, in the case of decisions that were effectively final, recourse to a vote was not to be encouraged. In retrospect, one might ask whether the approach advocated by the Commission in 1996 and the spirit of consensus had been respected and followed during the consideration of draft article 7 in 2017. The answer was, of course, that they had not, with the outcome giving credence to the proverb "more haste, less speed".

The topic of immunity of State officials from foreign criminal jurisdiction bore upon important aspects of international relations. Major differences existed within the Commission on whether there should be exceptions to the principle of immunity under customary international law and the scope of any such exceptions. Nearly one third of the members of the Commission had explicitly objected to the adoption of draft article 7, which sought to expand the exceptions to immunity, both in the Drafting Committee and when the Commission had met in plenary. In the circumstances, the Commission should have proceeded in accordance with the principle of consensus and continued consultations on the draft article, or at least gone through a "cooling off period" and followed the reasonable suggestion of some members to wait until after the Special Rapporteur had proposed a draft article on procedural safeguards, so that draft article 7 and the draft article on procedural safeguards could be considered together at the current session. Instead, the Commission had hastily put the matter to a vote, had forced through a draft article that was highly controversial and had handed over what remained a delicate issue within the Commission to the Sixth Committee and Member States. It had become clear that the Commission's actions had been hasty, harmful and counterproductive, and that they would not receive the support of the majority of Member States. Of the 45 representatives of Member States who had taken the floor on the topic during meetings of the Sixth Committee in 2017, as many as 26 had expressed reservations and concerns of varying degrees in respect of the Commission's practice of adopting draft article 7 by vote. Such opposition had rarely been seen in the 70-year history of the Commission, which could not turn a blind eye to the questions and criticisms of Member States. Achieving consensus on important legal issues was a basic principle and a fine tradition within the Commission. It was also a proven, effective method of work that should be adhered to in the long term.

Mr. Nguyen said that he wished to express his sincere gratitude to the Special Rapporteur for her extensive work on her sixth report and to pay tribute to the former Special Rapporteur, Mr. Kolodkin, for his concise, comprehensive and well-structured

reports. Taken together, the reports on the current topic provided a solid foundation for the Commission's discussions. Although the topic had been included in the Commission's programme of work over a decade previously, its significance and relevance were undiminished.

The report provided a summary of the Commission's rich debate on draft article 7 and of the reaction of States to the controversial and politically sensitive question of immunity in the context of international relations. The summary gave the impression that the Commission should strive, as much as possible, to achieve consensus in its decision-making. A vote should be taken only for decisions on procedural, rather than substantive, matters. It was important to remember that the Commission was a subsidiary organ that gave recommendations to States and the General Assembly. The divergence of opinion within the Commission, whose members represented the main forms of civilization and the principal legal systems of the world, would make States hesitant to adopt any draft text on the topic.

In *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), the International Court of Justice had noted that the rules on immunity of States were of a procedural character. Similarly, the former Special Rapporteur had highlighted, in his preliminary report, that the immunity of State officials from foreign criminal jurisdiction was procedural, not substantive, in nature. Academic writings, however, had generally focused more on the substantive, rather than the procedural, aspects of immunity, while underlining that both aspects were inextricably interrelated. Nevertheless, that did not mean that an analysis of the procedural aspects could begin only after all the substantive aspects had been clarified. The consensus within the international community on the inapplicability of immunity to international crimes such as genocide, crimes against humanity, war crimes, torture and enforced disappearance indicated that the time was right to establish an initial procedure in relation to immunity. That procedure would continue to be applicable as the list of international crimes expanded in the future.

In his third report, the former Special Rapporteur had discussed the so-called "traditional procedural elements", namely the timing of consideration of immunity, the invocation of immunity and the waiver of immunity. In her analysis in paragraphs 41 to 44 of the report, the current Special Rapporteur included additional elements, such as mechanisms and instruments of international legal cooperation and assistance to facilitate communication and consultation between the forum State, the State of the official and their relevant organs, procedures of cooperation with international courts and related procedures. Her approach was highly appreciated, because the procedural aspects of immunity should be examined in a broad and comprehensive way. Nevertheless, the fact that those aspects were analysed and presented without any draft articles being proposed to reflect the content of the report made it difficult for the reader to follow the analysis and provide constructive comments. For example, in paragraph 41, the Special Rapporteur listed four dimensions that needed to be analysed, before stating, in paragraph 42, that the first and second dimensions had already been analysed in the third report of the former Special Rapporteur. Despite acknowledging that the remaining dimensions had not yet been addressed in the Commission's work, she surprisingly stated, in paragraph 44, that she would examine only the first dimension in her sixth report. The reader might therefore be somewhat confused by the Special Rapporteur's logic. As he understood it, the remaining dimensions could be analysed in the seventh report. It was regrettable, too, that the Special Rapporteur did not discuss the rights of the defence and other elements pertaining to the concept of a fair trial, as she had promised to do in 2017.

With regard to timing, the Special Rapporteur emphasized the lack of guidance from treaties and jurisprudence as to the definitions of the terms "early stage" and "at the earliest opportunity". She did, however, provide some helpful jurisprudence, including from the International Court of Justice, on when immunity should be considered. The report contained more examples of national jurisprudence than the previous report, particularly from European, American and African States, though it was regrettable that no Asian State practice was mentioned in paragraph 56. It would have been useful, perhaps, to refer to the 2011 case of *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC*, in which the Hong Kong Court of Final Appeal had held that sovereign States were

absolutely immune from jurisdiction in Hong Kong. In that connection, article 5 (2) of the Vietnamese Criminal Code of 2015 offered some guidance on the procedure of application of immunity to State officials. However, the limited State practice available was insufficient to guide the Special Rapporteur to the conclusion that "immunity must be considered by the courts of the forum State, at the earliest opportunity". National procedural legislation was diverse and presented a variety of approaches to establishing a point of departure for immunity to be invoked, implemented or waived. While the trend towards including immunity at the early stages of the criminal process provided State officials with appropriate safeguards, it also affected the freedom of national courts in the fight against impunity. Those two elements should be considered jointly. In addition, the Special Rapporteur did not put forward a firm recommendation with regard to timing, as she identified three different times when the forum State should consider the immunity of State officials. She did, however, note that there was nothing to prevent courts from addressing immunity at a later stage, even during the appeal stage.

The lack of State practice pushed the Special Rapporteur to adopt a deductive methodology. For example, in paragraph 70, she stated that: "It may be concluded by extension that this inviolability also applies to Heads of State, Heads of Government and Ministers for Foreign Affairs. This may be inferred from the Convention on Special Missions." She went on to add that the inviolability in question appeared to have been recognized as a rule of customary law. It might be advisable to be more explicit in that regard.

In section C of chapter II of the report, on the material elements of jurisdiction, the Special Rapporteur explored three categories of acts affected by immunity. The categories were helpful in illustrating the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the challenges associated with identifying the latter. For example, in the case of detention, the Special Rapporteur highlighted that there were no rules under treaty law, customary law or case law that recognized the inviolability of State officials who enjoyed immunity *ratione materiae*. Similarly, in respect of appearing as a witness, the applicability of immunity *ratione materiae* was not entirely clear as it required the provision of official documents to prove that an act had been performed in an official capacity. As to precautionary measures, the Special Rapporteur stressed that there were no special rules or examples of State practice to support the argument that such measures affected immunity *ratione personae* or immunity *rationae materiae*. The jurisprudence cited in the footnotes was also very limited and mostly from international courts. Consequently, it appeared that there was insufficient evidence in treaty law, case law and State practice to suggest that the three categories explored by the Special Rapporteur mainly affected immunity *ratione materiae*.

In section D of chapter II, the Special Rapporteur dealt with the determination of immunity. Although the issue was indisputably relevant to the concept of jurisdiction, the Special Rapporteur highlighted that "it seems obvious to conclude that this competence belongs to the specific organs of such jurisdiction". The matter therefore seemed to go beyond the scope of the Commission's work and should be left to States to decide in their national legislation. The Special Rapporteur considered that the best instrument of determination was the "suggestion of immunity" applied in the United States of America, where the Department of State referred to courts its opinion as to whether or not a given foreign official enjoyed immunity. However, the Special Rapporteur did not provide any reasoning or justification for labelling that instrument the "best" or most appropriate to adopt. The case law that she cited was exclusively from the United States. He was thus not convinced by her conclusion, which was unsubstantiated and would have benefited from an in-depth analysis of other foreign courts and jurisprudence.

It was asserted in the report that the administrative organs of some States did not have the capacity or desire to transmit their views to courts, as they wanted to avoid speculation of improper political influence. However, the Special Rapporteur cited only one State, namely Germany, in support of that point. It would have been more convincing and helpful if the Special Rapporteur had provided examples and analysis of other State practice.

When analysing the procedural aspects of immunity, the relationship between immunity, on the one hand, and *jus cogens* and universal jurisdiction, on the other, was impossible to ignore. In paragraph 132 of his third report on peremptory norms of general international law (*jus cogens*), the Special Rapporteur on the topic, Mr. Tladi, had drawn the conclusion that "immunity *ratione materiae* does not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*)". However, in the report under consideration, that point was merely alluded to in footnote 197, which concerned the conclusion of the United States Court of Appeals for the Fourth Circuit in *Yousuf v. Samantar* that "there was a growing trend in contemporary international law to refuse recognition of immunity of an official in respect of acts contrary to the *jus cogens* norms, irrespective of whether the act can also be ascribed to the State". *Jus cogens* and universal jurisdiction were incompatible with immunity *ratione materiae*. It was essential for that matter to be addressed in the seventh report in the interests of consistency in the Commission's work and in line with article 27 of the Rome Statute of the International Criminal Court.

The report would also have benefited from a bibliography at the end to help the reader to identify relevant primary and secondary sources on the topic.

The meeting rose at 12.30 p.m.

Provisional

For participants only

24 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3440th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 31 July 2018, at 3 p.m.

Contents

Immunity of State officials from foreign criminal jurisdiction (*continued*)

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VII. Provisional application of treaties (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (*continued*) (A/CN.4/722)

Ms. Galvão Teles said that she would like to thank the Special Rapporteur for her sixth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/722). Although only of a preliminary character, the report and the plenary debate would allow the Commission to continue to make progress on an important, yet sensitive, topic. As the work begun by the Special Rapporteur on the analysis of the procedural aspects of immunity in the sixth report would be finalized in the seventh report and proposals for draft articles would be submitted in 2019, her comments, too, would be merely preliminary in nature and subject to a complete analysis of the procedural aspects of immunity, which would be possible only the following year.

The issues related to the procedural aspects of the recognition of immunity of State officials were largely absent in the literature and in international instruments that dealt with immunities, which tended to focus on the substantive dimension of the concept. Consequently, that part of the work of the Commission on the topic was particularly important. It was also of particular relevance since the procedural aspects and safeguards contributed to achieving the necessary balance between the different values and interests at stake, namely the sovereign equality of States and the stability of international relations, respect for the jurisdiction of the forum State, the fight against impunity and the individual rights of the officials concerned.

She would begin with some general remarks on the three procedural aspects of immunity treated in the report: the temporal, or timing, element; the material element; and competence for the determination of immunity. She would then turn to possible subjects for further discussion the following year that had been identified in paragraphs 24, 35, 36, 41 and 109 of the report involving procedural aspects of immunity that related to the role of the State of nationality of the official and the possibility of prosecution in that State. In addressing those aspects, she would also refer, as appropriate, to a recent case decided in the Portuguese courts that pertained to the issues covered in the sixth report and those expected to be dealt with in the seventh report, which could be of relevance to the Commission's discussions on the procedural aspects of immunity. In that case, the Court of Appeal of Lisbon had, on 10 May 2018, issued a decision on criminal proceedings against a former Vice-President of Angola involving the topic of immunity from criminal jurisdiction and a request for the transfer of proceedings to the State of nationality of the official.

With respect to the timing element, or the issue of when immunity should be considered, which was covered in paragraphs 49 to 63 of the report, the Special Rapporteur discussed the moment in the proceedings when the competent authorities of the foreign State should consider the existence of immunity of State officials and make a decision in that regard. The main international instruments dealing with State or diplomatic immunities were silent on the question of the moment when immunity should be considered, as were most national laws on immunity.

She agreed with the Special Rapporteur that, given that the nature of immunity was to prevent the exercise of jurisdiction by a State over officials of foreign States, a decision on the applicability of immunity to a defendant must be adopted as early as possible in the proceedings and, in any case, always before the adoption of any binding decision or coercive measure against the State official. As the Special Rapporteur pointed out, that conclusion was supported by international case law; there was also relevant national judicial practice.

Difficulties could arise, however, regarding the applicability of the rules of immunity of State officials to the investigation phase of criminal proceedings in the forum State, particularly due to the diversity of national models of investigation and prosecution. Nevertheless, it was true for most systems that, during the investigation phase, State authorities were still trying to determine which acts and persons might be involved in a crime and could potentially be subject to criminal proceedings. It was only when a person was indicted or identified as a suspect at the final stage of an investigation, or when the

competent authorities intended to apply coercive measures in the context of an investigation, that the person came under the criminal jurisdiction of the State. Accordingly, it was only at those moments in the investigation that the suspect's capacity as a State official and the enjoyment of immunity from jurisdiction should be considered. As the Special Rapporteur pointed out, such a position found support in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Furthermore, it should be noted that, in several cases, the performance of investigatory acts could be of fundamental importance in deciding whether a State official should be awarded immunity in a given case. That was particularly true in cases involving functional immunity, in which the competent authorities must first determine whether an agent was a State official and whether the relevant acts were performed in an official capacity before taking a decision on the enjoyment of such immunity.

Lastly, if a crime could not be investigated because of the mere suggestion that a foreign State official could be implicated, immunities would be absolute, and it would never be possible to apply the exceptions to immunity provided for in the draft articles for the commission of the most serious international crimes.

Turning to the material element, concerning the acts of the forum State that were affected by immunity, which the Special Rapporteur analysed in paragraphs 64 to 96 of the report, she pointed out that, as a general rule, it was proposed that acts that were characteristic of the exercise of criminal jurisdiction by the State were affected by immunity. Those included acts performed by or before criminal courts such as an indictment, a summons to appear before the court as a suspect or accused, a detention or arrest order or an extradition order. Such a proposal appeared to be supported by international conventions that stipulated that certain categories of persons were inviolable and could not be subject to any form of arrest or detention, or any measure of enforcement. However, it might be that not all but only certain types of acts related to the exercise of criminal jurisdiction necessarily affected the immunity of State officials.

In the above-mentioned case decided by the Court of Appeal of Lisbon, the Court had addressed one of the arguments in favour of immunity raised by the accused, who had claimed that, even though he no longer enjoyed personal immunity at the time of the appeal since he was no longer in office, he had enjoyed such immunity throughout his time in office and that it covered all his acts, both private and official, including those performed before he had taken office. As a consequence, the defendant had argued that all acts of the relevant authorities in the criminal proceedings between the initiation of the investigation and the expiry of his term of office had been in violation of his immunity and should be considered as null.

The Court had rejected that reasoning. It had highlighted that immunities of State officials, as recognized by international law, constituted an exception to the general principle that a State had full jurisdiction over its territory. Such immunities were justified by the need to guarantee the sovereign equality of States and to allow State officials to perform their functions freely and effectively. Therefore, limitations on the jurisdiction of each State and its right to try a foreign Head of State who violated its criminal law should be placed only to the extent necessary to allow that Head of State to fulfil his or her functions without external interference. To allow for other exceptions might affect State equality and the independence of the forum State.

The Court had considered that acts against a serving foreign Head of State such as court orders, coercive measures, acts or measures to collect evidence or the issuing of indictments, were prevented by immunity rules. However, all other acts performed in the course of criminal proceedings that did not entail measures such as the bringing of a criminal complaint, the opening of investigations, the collection of evidence or the issuing of an indictment, did not have any direct influence *per se* on the exercise of the functions of that Head of State and were not covered by immunities from jurisdiction. The Court had found no indication in the proceedings of any act that might constitute a violation of the immunity of the Vice-President during his term of office. In summary, the Court of Appeal of Lisbon had held that only certain acts performed in the course of criminal proceedings

were affected by immunities of State officials and that the test should be to determine which acts could interfere with the exercise of their official functions.

As to the determination of immunity, addressed in paragraphs 97 to 108 of the report, there seemed to be no question regarding the competence of the forum State to determine whether immunity from criminal jurisdiction applied in a given case. As a rule, the courts of the forum State, as jurisdictional organs, would be competent to decide whether they could exercise their jurisdiction or whether immunity rules applied. In some jurisdictions, other organs of the State might intervene in that determination. That was the case, for instance, when the Government issued an opinion to the courts on whether or not a foreign official enjoyed immunity. That was not the case, however, in many jurisdictions, including in Portugal, where there was no such role for the Government.

As to the State of nationality, it often intervened in the proceedings initiated against its officials abroad and also played a role in the determination of immunity. The extent to which it could intervene in that determination and in the development of the proceedings seemed to be, however, more controversial. A well-established option through which the State of nationality could intervene in the proceedings initiated abroad against one of its officials was through the issuing of a waiver of immunity. It was generally agreed that, because the purpose of granting immunities to State officials was not to protect the individuals but the State that they represented and its sovereignty, it was for the State to claim or to waive immunity for its officials. If a State chose to intervene in proceedings abroad in order to waive the immunity that would be enjoyed by one of its officials — namely, because it considered that the acts in question should not be protected — the official had no defence and could face trial for his or her actions.

In certain cases, the determination of the existence of immunity might pose difficulties, particularly when functional immunity was at stake. In such cases, she agreed that the courts would usually need to obtain more information regarding the official, his or her function and the nature of the alleged acts. Other organs of the forum State could provide that information but the best source would often be the State of nationality of the official.

As the Special Rapporteur pointed out, there were no international rules or decisions by international courts related to the validity and relevance of the information provided by the State of nationality of the official regarding the official's status and the official nature of acts performed by the official. However, relevant considerations could be found in the advisory opinion of the International Court of Justice on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The Court had clarified that a finding of immunity by the Secretary-General "creates a presumption which can only be set aside for the most compelling reasons" and that it must be given "the greatest weight by national courts", thus creating a balance between the interests of the forum State and those of the United Nations.

By applying the same rule to the question of immunity of State officials, it could be argued that a balance between the interests of the forum State and the State of nationality required the courts of the forum State to give great weight to the opinion issued by the State of nationality concerning the quality of the official functions performed by its official abroad but permitted the courts to disregard that opinion if solid information to the contrary was obtained. Nevertheless, care should always be taken to distinguish, for the above-mentioned purposes, whether the claim to immunity was based on international law, conventional or customary, or merely on the domestic law of the State of nationality, which was not binding upon the forum State.

It was worth recalling the decision of the Lisbon Court of Appeal, which had dismissed the claim that the immunities rules established in the Constitution of Angola granting the Vice-President immunity for five years from the date of expiry of his term of office should be equally applied to the Portuguese courts.

Turning to an issue that had been identified but not yet developed by the Special Rapporteur, she said that the State of nationality of the official might wish to prosecute the official for his or her actions in its own courts. In that case, the question arose as to whether the State of nationality should have preference in exercising jurisdiction over its officials

and whether the person in question should be extradited, upon request, for that purpose, or, if the person was not in the custody of the forum State, the proceedings should be transferred to the State of nationality of the official.

Some authors had proposed that horizontal enforcement of international criminal law, although both necessary and desirable in certain cases, should comply with the principle of subsidiarity. According to that view, the courts of the third State should consider, when assessing their own jurisdiction, whether there was a reasonable prospect that the defendant's conduct would be the subject of a genuine investigation in his or her home jurisdiction.

National legislation and case law in certain States also supported the application of the subsidiarity principle in prosecutions of foreign officials. For instance, in Spain, although universal criminal jurisdiction could be exercised under certain conditions, the law required that courts generally deferred to ongoing or impending foreign national prosecutions in the territorial State of the crime, unless, as a Spanish court had found, serious and reasonable proof of judicial inactivity demonstrated a failure, whether of will or of capacity, to effectively prosecute the crimes.

Similarly, certain international crimes were subject to the universal jurisdiction of German courts; however, the German Federal Prosecutor would exercise that jurisdiction only if the competent authorities of the territorial State or of the State of nationality did not carry out a genuine investigation and a competent international tribunal did not pursue the case. In a case brought by Iraqi nationals against a former United States Secretary of Defense and other United States military officials for alleged torture at the Abu Ghraib prison in Iraq, the Federal Prosecutor of Germany had argued that the crimes were already under investigation by United States authorities, which had had a closer connection with those events, and therefore the principle of subsidiarity would not permit the German authorities to investigate the complaint.

The application of the principle of subsidiarity in criminal prosecutions was also required by Belgian and Swiss law and was applied as a prudential doctrine by courts in Austria, the United Kingdom, Denmark, Norway and Switzerland.

Furthermore, the idea of subsidiarity found expression in the principle of complementarity established in article 17 of the Rome Statute of the International Criminal Court, pursuant to which the Court could investigate a matter only if a State was genuinely unable or unwilling to investigate and prosecute. That principle was considered to promote a balance between State sovereignty and the pursuit of international justice.

The introduction of a similar principle in the context of the exercise of criminal jurisdiction by foreign courts over officials of third States might be useful to strike that same balance. Even in those cases in which immunity did not apply to the conduct of foreign officials or when it could be set aside, it could be argued that States should refrain from prosecuting foreign officials if their State of nationality was able and willing to investigate criminal allegations itself, as long as there were no indications that such proceedings were a sham and only intended to avoid effective prosecution abroad. That would be an important safeguard to avoid politically motivated prosecutions, while still fighting impunity and promoting criminal responsibility, and one that could be developed by the Special Rapporteur in her seventh report.

In the case decided by the Court of Appeal of Lisbon, the defendant had claimed that he enjoyed immunity from Portuguese jurisdiction and had requested that the proceeding against him should be dismissed, and, alternatively, requested that his proceeding should be separated from proceedings against the other defendants and transferred to Angola. Although the Court of Appeal had upheld the decision of the court of first instance according to which the former Vice-President did not enjoy immunity from criminal jurisdiction in the proceedings in question, it had gone on to respond to the request to have the proceedings transferred to Angola.

The Court had had to decide whether the criteria for the transfer of a criminal proceeding in Portugal to a foreign State established by Act No. 144/99 had been fulfilled, namely the proper administration of justice and the social reintegration of the defendant in

the event of a conviction, and, accordingly, whether the proceeding could be transferred to Angola. The Court of Appeal of Lisbon concluded by ordering that the continuation of proceedings against the former Vice-President should be delegated to Angola.

The sixth report contained a relevant analysis of some of the topics that arose in the consideration of the procedural aspects of recognizing and applying immunity of State officials in foreign criminal jurisdictions. As she had mentioned, those topics tended to be absent from academic debates and were usually not detailed in international instruments dealing with immunity. However, there was relevant practice that would allow for determining certain rules concerning the procedural aspects of immunity. As the seventh report would continue the work begun in the sixth report and conclude with a proposal for a set of draft articles, a more complete analysis had to be postponed until the continuation of the debate on the topic at the following session.

Mr. Ruda Santolaria said that he wished to congratulate the Special Rapporteur on her clear and well-structured sixth report, which gave a useful account of the progress made and the discussions that had taken place within both the Commission and the Sixth Committee and began to address the procedural aspects of immunity from foreign criminal jurisdiction, a key issue that would be further developed in the seventh report.

With regard to the progress made thus far, he wished to highlight the work carried out with respect to the determination of the scope of the draft articles, which were without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law; the scope of immunity *ratione personae* for Heads of State, Heads of Government and Ministers for Foreign Affairs of immunity *ratione personae* with respect to acts performed, whether in a private or official capacity, during or prior to their term of office; and the scope of immunity *ratione materiae* for State officials with respect to acts performed in an official capacity. He also wished to underscore the development of a detailed list of serious crimes under international law in relation to which immunity *ratione materiae* did not apply, in accordance with the definition of such crimes in treaties explicitly mentioned in an annex that formed an integral part of the draft text.

In that connection, he underlined the mention in paragraph 17 of the sixth report of the need to strike a balance between the preservation of immunity as a guarantee of the principle of sovereign equality and the fight against impunity for the most serious crimes under international law, where the maintenance of unlimited immunity from jurisdiction *ratione materiae* could in practice lead to situations of impunity. Similarly, as indicated in paragraph 29 onwards, the procedural aspects of immunity from foreign criminal jurisdiction had been shown to be closely linked to the safeguarding and strengthening of immunity and the principle of the sovereign equality of States. At the same time, when considering situations in which immunity did not apply, it was critical to establish specific procedural conditions that ensured safeguards that protected both States and individuals.

A core issue emphasized by States and with which he fully agreed concerned the need to prevent the abusive or politically motivated exercise of foreign criminal jurisdiction. For that reason, the substantive aspects must be addressed in combination with procedural safeguards related to the limitations on and exceptions to immunity. The Special Rapporteur mentioned two central considerations in paragraphs 37 to 40 of the report: first, the need for procedural arrangements that would provide certainty to both the forum State and the State of the official, with a view to avoiding the possibility of jurisdiction being exercised over an official of a foreign State abusively or for political reasons and introducing an element of neutrality into the exercise and building trust between the two States, in addition to ensuring that a State official who might be affected by the exercise of foreign criminal jurisdiction enjoyed all of the procedural safeguards recognized under international law, in particular international human rights law; and secondly, the general statement to the effect that the jurisdiction of the State of the official took precedence over any foreign criminal jurisdiction.

He agreed with the Special Rapporteur in respect of a criterion of complementarity that there was in principle nothing to prevent the immunity of State officials from foreign criminal jurisdiction from being maintained and the primacy of the jurisdiction of the State of the official to prosecute crimes under international law allegedly committed by that

official from being ensured, provided that the exercise of such jurisdiction was effective. Thus, as the Special Rapporteur stated, efforts to combat impunity for the most serious crimes under international law would not be affected, in that immunity would serve as a mere procedural bar and international responsibility for the commission of the serious crimes would be deduced through the exercise of criminal jurisdiction by the State of the official.

He also agreed that immunity from jurisdiction must be considered by the competent organs of the forum State at an early stage in the process, at the earliest opportunity, before any judgment on the merits of the case was delivered and before binding measures were taken against a foreign official in judicial proceedings. With regard to whether immunity applied at the inquiry or investigation stage, he again agreed with the Special Rapporteur and her predecessor, Mr. Kolodkin, that it appeared impossible to conclude that such immunity must be taken into account and applied automatically right from the start of an investigation, although it would have to be considered when seeking to bring charges against the foreign official or to commit him or her for trial or in the case of interim measures during the investigation that could lead to summonses to appear or arrest warrants.

In relation to acts leading to the detention or arrest of a foreign official, a distinction should also be made between inviolability and immunity from criminal jurisdiction, since protection against detention stemmed from the former and not the latter. In that regard, the reference to the inviolability of Heads of State, Heads of Government and Ministers for Foreign Affairs as a rule of customary international law was very pertinent. Regarding appearance as a witness, he agreed that any binding measure by which a Head of State, Head of Government or Minister for Foreign Affairs was summoned to appear as a witness would be affected by immunity from foreign criminal jurisdiction, while, in the case of immunity *ratione materiae*, a summons to appear as a witness addressed to a foreign official would be affected by immunity only when it was binding and referred to acts performed in an official capacity. With regard to the determination of immunity, the references to the "suggestion of immunity" applied in the United States were particularly interesting, since the determination of immunity of certain foreign officials involved elements connected with the conduct of the State's foreign policy that should be clarified by the executive branch; the experiences of Austria and Spain, where under the legal framework courts could seek the opinion of public administration bodies to determine the applicability of immunity, was also of interest. It would be important to expand the analysis of State practice in the seventh report.

As concerned the future workplan, the sixth and seventh reports should be considered together, especially given that the draft articles based on those two reports would appear together given their close relationship. He hoped that it would be possible in 2019 to complete the review of the topic and to approve the set of draft articles on first reading.

Mr. Gómez-Robledo, after thanking the Special Rapporteur for her sixth report, said that the procedural aspects of immunity of State officials from foreign criminal jurisdiction were undoubtedly a matter of fundamental importance and he therefore agreed with the Special Rapporteur that the Commission should adopt a broad and comprehensive approach to the issue. However, it would not have been possible, as some members had requested, to have done so before dealing with all the questions that had been addressed in recent years and which were dealt with in the seven draft articles adopted by the Commission so far, in particular draft article 7, which referred to crimes under international law in respect of which immunity *ratione materiae* did not apply. He agreed that the definition of the concept of "criminal jurisdiction" was a very relevant issue that should not be disregarded. The review presented by the Special Rapporteur in the report would be very helpful in due course to the Drafting Committee in analysing the concept and reaching a conclusion on the matter.

As to when the immunity of State officials should be considered by the authorities of the forum State, he agreed that it should be at an "early stage in the process". However, that term was ambiguous and needed to be defined in more detail. The criterion noted by the Institute of International Law in its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, stating that immunity

from jurisdiction should be considered "as soon as that status is known to [the authorities of the forum State]", was relevant to the consideration of the matter. In that case, the issue at hand was the status of the individual as a State official with the right to immunity. However, he agreed that it was more complex to use that criterion in the context of immunity *ratione materiae*, since the authorities would need to consider not only the person's status, as in the case of immunity *ratione personae*, but also the nature of the acts in question and the context in which they had been committed. Thus, mere knowledge of the person's status as a State official was not necessarily sufficient to trigger the obligation to respect immunity *ratione materiae*.

The decisions of the International Court of Justice on issues related to the matter at hand were relevant. First, account must be taken of the Court's advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, which stated that questions of immunity were preliminary issues which must be expeditiously decided *in limine litis*, *i.e.*, at the beginning of the process and before addressing the substantive issues. The Court further indicated that that statement was a "generally recognized principle of procedural law". Secondly, consideration should be given to the important criterion established by the Court in its decision in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that immunity protected the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties. In other words, immunity applied when the act of authority of the State affected the functions of the State official. Similarly, it was highly relevant to take into account whether the act of authority of the forum State was constraining, as noted by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

As concerned the meaning of an "early stage in the process", it might be useful to apply by analogy the Court's interpretation, in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, of the phrase "without delay", referring to the obligation of the State to inform foreign nationals of their right to receive consular assistance. The Court noted that the term should not necessarily be interpreted as meaning "immediately upon arrest and before interrogation", but that the arresting authorities nevertheless had the obligation to fulfil their duty of information, as soon as it was realized that the person arrested was a foreign national or there were grounds to think that the person was probably a foreign national. In other words, criteria should be established that would allow it to be presumed that the forum State could not be unaware of the fact that the person was a foreign official who enjoyed immunity. In its consideration of the topic, the Committee should therefore take account of the criteria that: first, immunity should be considered without delay and in any case at the initial stage of judicial proceedings; and, second, that immunity should be considered before binding measures which could hinder the performance of official duties were taken in respect of a foreign official. Such measures would include but were not limited to: the bringing of a criminal charge, a summons to appear before the court as a person under investigation or to attend a confirmation of charges hearing, a summons to appear as the accused in a criminal trial, a detention order and an application to extradite or surrender a foreign official.

It might also be worth considering the possible participation of the executive authorities of the forum State in asserting immunities. In the case of Mexico, for example, the Ministry of Foreign Affairs, which was the State entity that had by far the most immediate interest in avoiding creating a dispute with the State of nationality of the official concerned, intervened before the court concerned to request that immunities should be respected. In the United States of America, he understood that it was the Department of State that would request the Department of Justice to take action, and the latter would, in turn, intervene before the court. If, on the other hand, the forum State had an interest in bringing the detained person to trial, it would hope that the State of the official would waive his or her immunity. In cases covered by draft article 7, it would also be up to the forum State to invoke the relevant exceptions. It would therefore be worth looking in greater detail at the participation of the executive authorities of the forum State and examining more thoroughly the issues already identified in chapter II, section D, of the report, on determination of immunity. In sum, although it was reasonable that the bodies with

jurisdiction over criminal matters should have the primary power to rule on immunity from criminal jurisdiction of a State official, other State bodies could have powers under national law to determine concurrently what should be done.

Other types of act that might not be of a criminal jurisdictional nature as such, but would undoubtedly affect the free exercise of the official duties of a State official, should be analysed. They would include detention in pursuance of an international legal cooperation and assistance mechanism or of a provisional arrest warrant for extradition purposes, which were acts issued by the judicial authorities of a third State. Such acts would not fall under the criminal jurisdiction of the State in question, which again underlined the importance of defining precisely what should be understood by "criminal jurisdiction".

In respect of the material element, he agreed with the analysis given in paragraphs 80 to 89 of the report concerning, among others, an order to make specific information available to a court on request. He thought, however, that the Commission should also examine the role that the United Nations Security Council could play in ordering a State to make certain information available to another State or a particular international body. Such a request would be more likely in respect of proceedings brought before the two international criminal tribunals established under Chapter VII of the Charter of the United Nations, namely the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, or any of the many existing hybrid tribunals. That did not, however, rule out a request for information being made in other situations involving the exercise of criminal jurisdiction at the national level. The facts of the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* included the Security Council's decision to order Libya not only to extradite the alleged terrorists, but also to hand over the files related to the investigations that had been carried out at that time. In a joint statement (document S/23308 (1991)), the United States and the United Kingdom requested Libya "to disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers". The Security Council endorsed the request in its resolution 731 (1992). The role of the Security Council in ordering the submission of documents or the implementation of International Criminal Court arrest warrants in situations referred to the Court by the Council could not be overlooked. For instance, the referral to the Court of the situation in the Sudan and the non-implementation of the arrest warrant for President Al-Bashir should be analysed in the light of the practice of the Security Council and of the obligations of States parties to the Rome Statute.

He wished to draw the Commission's attention to the fact that the provisional agenda of the seventy-third session of the General Assembly included an item concerning a request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials. The inclusion of that item stemmed from a decision (EX CL/1068 (XXXII)) taken at the thirtieth ordinary session of the African Union in January 2018, in which the Assembly of the Union requested the African Group in New York to immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other senior officials as it related to the relationship between articles 27 and 98 of the Rome Statute and the obligations of States Parties under international law. As the item had appeared on the agenda of the General Assembly the previous week, it was important that the Commission should continue to follow its development carefully, as it could serve to shed more light on the issues that the Special Rapporteur was working on.

The Court's advisory opinion would certainly be extremely important to the topic, and it was equally clear that the Court would take account of the progress made on the topic, including, of course, the adoption of draft article 7.

In conclusion, he said that he agreed with the workplan and that he was pleased to note that the Planning Group had decided to recommend that the requisite number of plenary meetings and Drafting Committee meetings on the topic should be scheduled for

the following session. He wished to express his appreciation of the statement made by Mr. Nolte that morning, including a proposal that could restore harmony and might even lead to consensus within the Commission. However, he had been surprised at Mr. Huang's comments regarding the use of a vote, which, as regrettable as Mr. Huang might consider it, was one form in which the Commission could adopt decisions. Some persons might consider it to be a less preferable method, but that did not make the decisions so adopted any less legal or less legitimate. He was concerned whenever an attempt was made to show that the value of a consensus was qualitatively superior to that of a vote. In his view, that was not the case; indeed, much of the great progress that had been achieved in international law since the Second World War had been by means of votes, in exercise of *de lege ferenda*, and not always of *lex lata*, as demonstrated by the adoption of the 1969 and 1986 Vienna Conventions on the law of treaties and the United Nations Convention on the Law of the Sea. He thought that Mr. Nolte's proposal could help to restore a better atmosphere within the Commission and allow it to make progress on the basis of a more consensual position and perhaps even achieve, or at least approach, a certain degree of unity. That said, the Commission should have no cause whatsoever to regret what had been done at the previous session.

Mr. Murphy, after thanking the Special Rapporteur for her sixth report, said that he associated himself with the concerns raised by Mr. Murase, Mr. Hassouna and Mr. Huang about the timing of its submission. Indeed, while he had tried over the previous three days to study the report, he could only offer preliminary comments and, like others, would speak further during the debate at the Commission's next session.

For the time being, he would like to address two general points: one relating to the debate held in the Sixth Committee at the General Assembly's seventy-second session; and the second regarding procedural provisions and safeguards.

The summary of the debate in the Sixth Committee provided in paragraphs 13 to 20 was, in general, thoughtful and balanced. At the same time, he encouraged members who had not already done so to read both the Secretariat's summary of the debate and, even better, the verbatim statements that were available online. The statements made were often quite sharp and pointed in their tone, indicating in many instances considerable dissatisfaction with both the Commission's process, and the Commission's substance, with respect to draft article 7. A failure to be cognizant of that dissatisfaction would not bode well for a successful completion of the present topic. In that regard, he would like to address a few substantive points arising from his reading of that debate.

First, every speaker who had addressed the matter had agreed with the Commission's conclusion that there existed no exceptions for immunity *ratione personae*, as noted at paragraph 14 of the sixth report. It would seem that no State believed that the "values of the international community" superseded the immunity *ratione personae* of a foreign State official from national criminal jurisdiction. No State believed that there was a "trend" away from such immunity.

In that regard, he continued to find it curious that supporters of draft article 7 often pointed to the lack of immunity before the International Criminal Court to demonstrate both the "values" and "trend" arguments. Any lack of immunity before the Court was, of course, treaty based, and therefore could not be applied as a matter of law to non-parties. Yet even if one viewed the lack of immunity before the Court as relevant, that immunity covered all State officials, including Heads of State, Heads of Government and Ministers for Foreign Affairs. So, any claim that the lack of immunity before the Court was directly relevant to national criminal jurisdiction was strikingly selective: it apparently deemed the Court relevant for denying immunity *ratione materiae*, but deemed the Court irrelevant for immunity *ratione personae*. Such selectivity most certainly reflected policy preferences, not law.

In any event, and secondly, the most salient outcome of the Sixth Committee debate was the fact that the overwhelming majority of States did not regard draft article 7 as codification of existing law. As the Special Rapporteur noted, at paragraph 14 of the sixth report, just "one State maintained that a customary norm already exists". That was 1 State out of the 49 States that had spoken in the Sixth Committee. Not a single other State had

indicated that draft article 7 reflected customary international law and many had said the opposite.

Rather, as the Special Rapporteur herself indicated at paragraph 14, many supporters of draft article 7 — including Austria, Chile, Czechia, Greece, the Netherlands, Peru, Slovakia, Slovenia, South Africa and Spain — viewed draft article 7 as progressive development of the law. Thus, even those that supported it did not regard it as codifying the law.

Thirdly, as noted at paragraph 18 of the sixth report, many States had now asked the Commission to clearly establish whether a provision amounted to progressive development or to codification. They did not wish to see the Commission being vague on that point. Such States included Australia, Austria, France, Germany, India, Ireland, Israel, Poland, Singapore, Spain, Switzerland and the United Kingdom. For example, Australia had said that it was vital that, where the Commission elected to advance a proposal that did not reflect existing law, that proposal should be clearly identified as such. Switzerland had said that it believed that it was of paramount importance that an article on the exceptions to functional immunity of State officials from foreign criminal jurisdiction should be either solidly based in extensive and virtually uniform State practice and *opinio juris* or clearly labelled as a progressive development of the law.

Fourthly, virtually none of the States had accepted the list of crimes that appeared in draft article 7 as being a correct list. Indeed, only 2 States out of 49 had found the list satisfactory as it currently stood. Every other State had commented that there was something problematic with the list; either it had too many crimes or it had too few, or that the list should not exist at all. Three States specifically pointed out that the Commission had developed no apparent criteria for why some crimes were on the list, while others were not. That observation echoed a concern that had been repeatedly pointed out in the Drafting Committee and that the Commission should not continue to ignore.

The overall point was that the divergent views of States about the crimes at issue — over whether aggression or corruption should be included in the list or why slavery was not included — painted a picture of an area of international law that was very far from being settled.

As a general matter, it would be incumbent upon the Commission, if it sought to complete the first reading on that topic at the following session, to revisit draft article 7 and its commentary, in the light of the views expressed by States in the Sixth Committee. The legitimacy and strength of the Commission's work was drawn in large part from its responsiveness to the views of States. He noted that, with respect to both of its first readings at the current session, the Commission had undertaken revisions of its prior work in the light of the reactions of States.

Turning to the issue of procedural provisions and safeguards, he said that the sixth report indicated, in paragraph 22, that it was initiating, but not exhausting, consideration of the procedural aspects of immunity. To that end, it addressed just three procedural aspects: when immunity should be considered by the authorities of the forum State; the acts of the forum authorities that were affected by immunity; and the determination of immunity. No draft articles had been proposed for any of those procedural aspects.

As for many others, in the time available after issuance of the report the previous Friday, it had not been possible for him to analyse the part of the report dealing with procedural provisions and safeguards carefully, including the citations contained therein. As such, he would provide just one preliminary reaction, which was that the Special Rapporteur did not seem to be contemplating anything that would meaningfully address the politically motivated removal of immunities for official acts based on spurious allegations.

The key paragraph whereby the Special Rapporteur signalled her intentions with respect to procedures and safeguards was paragraph 41. In his view, that paragraph did not appear to envisage any procedures and safeguards that were meaningfully protective of State officials.

Paragraph 41 (a), which was analysed in the remainder of the report, seemed to be leaning towards the idea of "procedures" that merely indicated certain temporal aspects

regarding the point at which immunity issues arose. Those issues presented no obvious safeguards and the Special Rapporteur did not characterize them as such.

Paragraph 41 (b) seemed to be leaning towards merely acknowledging that States might invoke immunity and might waive immunity. That, of course, was true, but it was rather hard to see how that constituted a "first level" safeguard against abusive denial of the existence of immunity in a forum State.

Paragraph 41 (c) appeared to be leaning towards calling upon the forum State to be in communication with the State of the official, which was appropriate, but also did not appear to be much in the way of a safeguard. States typically were already in contact with one another when enforcement measures were being undertaken against an existing or former State official. So, while he favoured the Commission's saying something about such communication, he did not see how it addressed politically motivated or abusive allegations in a forum State.

Paragraph 41 (d) appeared to be leaning towards a provision that called for the State official to be accorded a fair trial. Again, that was appropriate; he favoured such a provision and had no problem with the Commission's stating something to that effect. However, it was in fact only reinforcing a human right that was to be accorded to all individuals at all times, and it could not be characterized as a safeguard unique to the removal of the immunity of a State official.

Furthermore, none of those paragraphs indicated any procedures or safeguards specific to the denial of immunity under draft article 7. Rather, the Commission appeared to be headed towards a series of anodyne procedures that provided no particular protection in situations where a former President or Minister for Foreign Affairs travelled abroad and was then arrested, interrogated and perhaps imprisoned on the basis of mere allegations that his or her prior official acts fell within the scope of draft article 7.

Accordingly, his sense was that the Commission might be headed in a direction of not having any meaningful "safeguards" with which to address either the denial of immunity of State officials generally or in the specific context of draft article 7. He found that regrettable, especially given that many members had insisted at the previous session that draft article 7 could be safely adopted because the Commission would develop safeguards in the future. He was, however, quite heartened by several concrete proposals made in the current debate, such as those made by Mr. Murase, Mr. Nolte, Mr. Grossman Guiloff, Mr. Šturma and Ms. Galvão Teles, that would constitute true safeguards; he hoped that the Special Rapporteur would seriously consider them as she prepared her next report.

Lastly, at paragraph 109, the Special Rapporteur indicated that she intended to analyse in her next report "matters relating to cooperation between States and international criminal courts and the possible impact of such cooperation on immunity from foreign criminal jurisdiction". He had some doubts about embarking on that path given that there were many different international criminal courts, at the global, regional and subregional levels, operating under different constituent instruments, which bound States in differing ways. Such an approach did not seem to fit the nature of the current topic, which was not focused on treaty regimes.

Ms. Oral said that she would like to congratulate the Special Rapporteur on her very well researched sixth report, the submission of which had unfortunately been delayed for reasons beyond the control of the Special Rapporteur. In view of the late issuance of the report, she would make only preliminary remarks at the current session and provide a more detailed statement when the Commission met the following year.

The topic of procedure in relation to immunity from foreign criminal jurisdiction had been examined by the Secretariat in its very comprehensive memorandum (A/CN.4/596) and by Mr. Kolodkin in his excellent third report (A/CN.4/646), both of which had been taken into account by the Special Rapporteur in the current report.

Mr. Kolodkin had focused on three key elements of procedure: timing, invocation of immunity and waiver of immunity. However, in her sixth report, the Special Rapporteur raised, in particular in paragraph 35 thereof, several more procedure-related questions that would have to be answered adequately by the Commission if its work on the topic was to

have its maximum effect. She agreed with the Special Rapporteur that the approach to the procedural aspects should be broad and comprehensive, as outlined in paragraph 41 of the report.

She recalled that in 2017, she had voted in favour of the adoption of draft article 7 on exceptions to immunity *ratione materiae*. In her statement at the time, however, she had also highlighted the importance of procedural rules and was therefore pleased that the Special Rapporteur would, in her seventh report, provide draft articles in that regard.

As noted by the Special Rapporteur in paragraph 23 of her report, the topic of immunity of State officials from foreign criminal jurisdiction had, in the literature, traditionally focused on the substantive dimension of immunity and given only peripheral consideration to the related procedural aspects. She fully agreed with the Special Rapporteur's statement in paragraph 24 of the report that the procedural aspects of such immunity could not be ignored and that their importance could not be underestimated. That included the importance of respecting the interests of the sovereign equality of States and the stability of inter-State relations. However, at the same time, the stability of inter-State relations could not always be a justification for allowing impunity for the most serious of international crimes. Those two interests, the sovereign equality of States and the stability of inter-State relations, could be balanced and, in her opinion, draft article 7 provided a sound approach in that regard and would be further strengthened with procedural rules.

In that light she agreed with the view as expressed in paragraph 37 that clear definitions of procedural aspects could provide certainty and stability to international relations, especially between the State of the official and the forum State. It was very important to have a procedural mechanism that would reduce as far as possible the possibility of jurisdiction being exercised over an official of a foreign State abusively or for political reasons or ends. She agreed that, in general, the beneficiary of procedural rules was the accused individual. However, she also understood that a distinguishing element of immunity related to foreign officials was the highly sensitive matter of the stability of international relations.

In her view, a distinction should be made between ensuring the fundamental procedural rights of the defendant under international human rights law, as stated by Mr. Murase, and protecting the stability of international relations and preventing, or at least minimizing, the misuse of draft article 7 for political reasons or other reasons unrelated to the search for justice and the prevention of impunity. In paragraph 39, the Special Rapporteur recognized the need for maintaining the balance between those two interests and also the need for procedural safeguards in relation to exceptions to immunity.

In her view, those were two separate objectives. Without question, any official accused of a criminal offence in a foreign jurisdiction should be ensured all the procedural rights required under international human rights law, assuming that immunity had either been waived by the State of the official or an exception had been recognized by the forum State. That should be one of the procedural requirements relating to the exceptions set out in draft article 7.

However, the second issue concerned procedural rules to prevent the misuse of draft article 7 by States. One of the arguments made against the exceptions to immunity contained in draft article 7 was the view that substantive justice should not be at the expense of procedural justice, which was an essential requirement for the rule of law. However, as she had stated the previous year, procedural justice was associated with fundamental rules of justice, which were non-derogable rules. However, that was not the case for immunity.

Article 27 of the Rome Statute was an example that reflected the derogable nature of immunity. Therefore, the procedural rules concerning the application of draft article 7 should take that into account and not necessarily be equated with those rules of procedure that represented fundamental rights, as they involved different standards. Nonetheless, issues related to when the determination of the application of draft article 7 came into play would be a key issue, given the consequences for the individual official in question and the other preliminary procedural matters related to investigations and communications with the State of the official. In that regard, evidentiary issues would also be important. Several

interesting suggestions had been made by colleagues, including requiring determination by high-level courts or even the executive branch. Mr. Nolte had made interesting proposals, as had Mr. Grossman Guiloff. However, she agreed with Mr. Murase's warning that the Commission should avoid creating a fragmentation of rules given the practice developed under the Rome Statute. She had full confidence that the Special Rapporteur would take all the suggestions made into account and present the Commission with a set of solid draft articles to work with.

As further information on State practice would be of great assistance to the Commission's work, she hoped that more States would be forthcoming in that regard. She supported and welcomed the future workplan set out in the report, which promised to be comprehensive in addressing many of the remaining issues to be considered concerning procedural aspects of immunity of State officials from foreign criminal jurisdiction.

Mr. Hmoud said that he wished to thank the Special Rapporteur for her excellent sixth report, which contained a careful analysis of the various procedural aspects of immunity, a matter closely associated with the substantive aspects of immunity of State officials. The report was only preliminary, containing a general discussion of the procedural guarantees and an analysis of the issue of the timing of consideration of immunity, the acts that were affected by immunity and the entities that determined immunity. He trusted, as the Special Rapporteur stated in the report, that the other dimensions relating to procedure, namely the invocation of immunity, cooperation and communication mechanisms between the forum State and the State of the official and procedural safeguards, would be tackled in 2019 in the seventh report. That report would contain suggested draft articles on the procedural aspects, which would allow the Commission to complete a first reading of the topic.

He would start by making general comments on the sixth report before turning to the procedural dimensions discussed therein. First, he would like to reaffirm the importance, for the successful conclusion of the topic, of the inclusion of procedural provisions and guarantees, as the issue was mainly regulated under the national laws of States and there was little practice under international law. Practice among States was diverse, with no single international instrument regulating procedures relating to the immunity of foreign officials. The suggested draft articles would thus serve to assist States in harmonizing their procedures relating to immunity and in strengthening cooperation, and also to clarify ambiguous aspects that had practical implications on the treatment of immunity under national jurisdiction.

The second general point was that procedure and procedural guarantees, while being of particular importance to the issue of limitations to immunity *ratione materiae*, went beyond that issue and had a significant effect on the all substantive aspects of immunity. Thus, the proposed draft articles should be comprehensive, tackling all dimensions relating to immunity.

Another matter to be considered was the definition of acts performed in an official capacity, the definition of an official and the scope of immunity *ratione materiae*. Such definitions played an important role in determining the applicability of various procedures to be proposed in the relevant draft articles. While an official might claim that he or she had been acting in an official capacity, the court of the forum State would have to determine, based on the relevant procedure, the status of the claimed immunity and the ensuing process. In the same vein, the court might have to determine whether the person involved was an official representing the State or exercising State functions. Such matters were usually determined by the State of the official based on its national laws, but the courts of the forum State might determine otherwise. As such, the procedure employed would play an important role in resolving such contentious matters between the two States.

The invocation of immunity had a practical substantive effect, especially in relation to immunity *ratione materiae*. That was because the State that claimed the immunity for its official for an act performed in an official capacity might incur international responsibility for such an act if were proven wrongful. It was important, therefore, that the proposed draft article should clarify the relationship between procedural invocation of *ratione materiae* and the consequences of such invocation.

Another general point related to the issue of sovereign equality. Indeed, the procedural aspects should strike a balance between the right of the forum State to exercise jurisdiction, the right of the State of the official not to be subject to the jurisdiction of another State and to be able to perform its sovereign functions and the right of the official to receive procedural guarantees in accordance with international human rights standards.

Turning to his final general point, he wished to stress that procedural guarantees should aim to protect all relevant parties, whether the official, the State of the official, or the forum State, from politically motivated proceedings or politicization. That point had been raised by members of the Commission, including himself, at the past two sessions, and in the Sixth Committee. Needless to say, to the extent that immunity *ratione materiae* did not exist, there would be politically motivated prosecutions that jeopardized the proper functioning of States and the performance by its officials of such functions. While procedural guarantees might go a long way in protecting against such prosecutions, they would not end such practices or attempts against the sovereignty of other States. It was therefore of utmost importance for the Commission to take that into account in drafting the relevant procedural draft articles relating to situations where immunity *ratione materiae* did not exist. In that regard, useful proposals had been made the previous year both within the Drafting Committee and during the informal consultation, which he would urge the Commission to consider in the context of discussions of the seventh report in 2019.

Turning to specific comments on the report, he agreed with the Special Rapporteur that the inclusion of a definition of criminal jurisdiction was important for several reasons. Not least was the fact that what would be included in the scope of criminal jurisdiction of the forum State would be subject to the legal regime on immunity and the associated procedural process. As explained in the report, if a certain act of the forum State was considered an exercise of jurisdiction, then that would determine the timing of the consideration of immunity and the triggering of such immunity. Such consideration by the forum State should be at an early stage, a matter that he had supported in his comments on the third report of Mr. Kolodkin. There was sufficient State practice that confirmed the existence of the principle. However, practice was diverse among national jurisdictions as to what constituted an early stage, and the Commission should strive to provide a substantive but practical meaning for that term. The key test, however, was that the timing of consideration of immunity should be associated with protecting the purpose of immunity and preventing abuse. Although outside the scope of the present topic, practice relating to the implementation of immunity under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and other conventional immunity regimes should provide useful guidance. How national courts and the executive treated such special immunities in terms of timing of consideration could play an important role in guiding the Commission on that matter. The draft articles should also guarantee that, once the status of immunity was known, the forum State must not be able to abuse its position regarding the applicability of the immunity regime. That was supported by the pronouncement of the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, when it had stated that the preliminary issue of immunity must be decided expeditiously and that that statement reflected a recognized general principle of procedural law intended to prevent the nullifying of the essence of immunity.

With respect to the meaning of consideration of immunity at an initial stage of judicial proceedings, he was not sure that early inquiry was not also covered. That, of course, depended on several factors, including the legal system of the forum State and whether it considered an inquiry to be part of the exercise of criminal jurisdiction, whether the inquiry involved certain coercive or other measures that might infringe upon the immunity in question and whether the inquiry involved more than one subject, who might or might not enjoy immunity. A related point was that the judiciary might not be the exclusive authority to decide on immunity at an early stage. That again depended on the legal system of the State and whether other bodies, including the executive and the prosecution, had that kind of authority.

Turning to the material element, he agreed with the basic test, which was whether the acts of the State against which immunity from criminal jurisdiction could be invoked

were coercive in nature. Another key element to be taken into account was whether the act against the official hindered the performance of the functions of the State of the official. That was the premise of immunity from foreign criminal jurisdiction that the International Court of Justice had consistently referred to in the *Arrest Warrant* case. As such, that should provide guidance in determining whether the act of the forum State violated such immunity. Detention and other measures of execution were inherently in conflict with the immunity of the State official from the criminal jurisdiction of the forum State, as they were both coercive in nature and infringed upon the proper functioning of the State of the official, who would otherwise enjoy immunity. A point related to detention was raised in paragraph 68 of the report namely the distinction between inviolability and immunity. While it was true that international instruments had treated them separately, the basic premise was the same, which was that they constituted a procedural bar against the exercise by the forum State of its criminal jurisdiction. For the purposes of the topic under consideration, no research had been done on the legal distinction between immunity and inviolability. He would welcome further analysis and research in future reports on whether the forum State could exercise jurisdiction but nevertheless be under the obligation to respect the inviolability of the official. While he understood the logic advanced by the Special Rapporteur in paragraphs 73 and 75 to distinguish between immunity *ratione materiae* and immunity *ratione personae* as they pertained to inviolability — assuming that the official's immunity *ratione materiae* had been established without limitation — he did not see how that person did not enjoy inviolability from detention or other measures restricting liberty.

Regarding appearance as a witness, he agreed that, unless special rules on immunity applied, an official did not enjoy immunity from testifying in the forum State's courts. Obviously, the test mentioned above applied also in that context. Serving as a witness should be voluntary and should not hamper the functions of the State of the official or violate that State's immunity under international law or the immunity and inviolability of its documents and other official material. That was true for both immunity *ratione personae* and immunity *ratione materiae*, although, in the latter case, the threshold might be higher.

The same applied to precautionary measures, where the above tests should be applied to determine the legality of the measure. In relation to immunity *ratione personae*, precautionary measures restricting the liberty and travel of the official were inconsistent with such immunity. He agreed with the Special Rapporteur that, as far as immunity *ratione materiae* was concerned, the situation was more nuanced and should be determined on a case-by-case basis, with the primary consideration being the disruption of the functions of the official's State by reason of such measures.

On the determination of immunity, which he had discussed above in a different context, he agreed that, generally, it was the court of the forum State that made a definitive determination but, again, it should be left to the national laws of that State to decide the matter. The executive might have an advisory role with respect to its national courts in determining the existence or lack of immunity. As such a role might be more than advisory and more determinative in nature, the Commission should adopt a flexible approach that reflected the primary role of the national courts of the forum State but also recognized that it might not be the exclusive authority. Obviously, in the context of immunity *ratione materiae*, and especially with respect to draft article 7, the role of the State of the official might be the key element in the determination of immunity. As mentioned earlier, that State might assert that the act had been carried out in an official capacity, which would establish its own legal consequences. Suggestions made by Ms. Galvão Teles, Mr. Murase and Mr. Nolte might be pertinent to the determination of such immunity and the application of its limitations. The forum State and the State of the official should also cooperate in determining on the basis of objective criteria whether the person was an official and whether the act was official.

Lastly, on the future programme of work, he looked forward to the Special Rapporteur's seventh report, which would contain the procedural provisions and guarantees and a discussion of the remaining procedural aspects, including invocation of immunity, waiver of immunity, cooperation and communication between the forum State and the official's State and the rights of the official. He hoped that the Commission would be able

to finish the remaining work on definitions in draft article 2 and other pending matters. He also hoped that the Commission would manage in the coming year to conclude its work on the substantive aspects relating to limitations to immunity *ratione materiae*, a matter that he had addressed in his statement on the Special Rapporteur's fifth report in 2016.

Mr. Zagaynov, thanking the Special Rapporteur for her sixth report, said that, like others, he regretted that it had been distributed at such a late date. The time to make a proper analysis and assessment of the document had consequently been very limited, especially in view of the complexity and sensitivity of the topic. He would thus offer only a few brief comments regarding primarily future work on the topic and leave open the possibility of speaking in greater detail about the content of the sixth report and the seventh report in 2019.

He fully shared the criticisms expressed by Mr. Huang regarding the Commission's work on the topic, including the approach to decision-making. The vote that had taken place the previous year should give the Commission cause for serious reflection. The departure from the practice of reaching consensus-based decisions and the failure to take account of the views of a significant number of Commission members could have a significantly adverse effect on future work. He agreed that, under the circumstances, it was necessary to continue efforts to reach a solution that would be acceptable to all.

Consideration of the topic of exceptions to the immunity of State officials from foreign criminal jurisdiction had led to deep rifts among members of the Commission. The debate in the Sixth Committee had shown that States were divided in their assessments. The position of a large number of delegations was based on the fact that there was currently no State practice to suggest the existence of or a trend towards a rule of customary law that would allow for exceptions to such immunity. He agreed with the view expressed by Mr. Nolte that the Commission should ascertain whether that was indeed the case. It was clear that many delegations in the Sixth Committee had been very concerned about the situation that had arisen, including the vote taken.

In the preparation of the next report and further work on the topic, the Special Rapporteur should take full account of the outcome of the discussions in the Sixth Committee in 2017 and 2018. As had been proposed by Mr. Murphy, the best option would be to return to work on the text of draft article 7. However, he took it from the statement of the Special Rapporteur that she had ruled out such an option. He would encourage her, nevertheless, to work towards overcoming the division among Commission members and delegations.

It would no doubt be logical to have provisions on procedural safeguards in the draft articles, and ideas on that issue should be given careful consideration. However, without going into the substance of the report, he doubted that a set of procedural guarantees would suffice to offset a formulation of such a conceptual and substantive nature as that contained in draft article 7.

In his view, expanding the scope of the topic to include issues concerning international criminal jurisdiction would not be helpful in overcoming the differences of views both within the Commission and among States. At the outset, when it had been proposed to include the topic in the Commission's long-term programme of work, questions concerning immunity from international criminal jurisdiction had been expressly ruled out. As indicated in paragraph 1 of provisionally adopted draft article 1, "the present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State". In the report, there were proposals to consider very complex issues on the obligation of States to cooperate with international criminal tribunals and courts and hand over foreign officials to such tribunals and courts that, in his view, went beyond the agreed framework and would lead to deeper rifts within the Commission. Therefore, the consideration of such aspects at the current stage would be counterproductive.

The Commission was currently at a crucial stage of its work on the topic of immunity, which could have far-reaching consequences. Further discussion within the Commission could deepen the rift or help it to overcome it, or at least prevent it from widening any further. By way of conclusion, he would like to express the hope that the

Special Rapporteur would lead the Commission along the latter path and to wish her every success in doing so.

Mr. Petrič said that, as many Member States in the Sixth Committee had expressed a need for caution in relation to the topic, he wished to urge both the Special Rapporteur and the Commission as a whole to take their concerns very seriously. The suggestions made by Mr. Nolte at the previous meeting could be helpful in that regard. A proposal from the Special Rapporteur for firm and clear procedural guarantees could also be a step in the right direction. He hoped that at its next session the Commission would have a clearer picture in that regard because, until it saw the proposed draft articles, it could not make a final decision, including, for his part, in relation to draft article 7.

Mr. Rajput said that he would like, in view of the lack of time that the members had had to examine the report, to ascertain the procedure that would be followed in respect of statements made during the current and the next sessions, particularly given that the debate in 2019 would concern both the sixth and the seventh reports, the latter containing the proposed draft articles. He presumed that the sixth and seventh reports would be discussed together, given that no draft articles were proposed in the sixth report and that the seventh report would contain proposed draft articles based on the analysis set out in the sixth and the seventh reports. He also hoped that it would be possible to receive the seventh report in a timely fashion, unlike the current year; members needed sufficient time to study, analyse and reflect on Special Rapporteurs' reports.

The Chair said that members who had made a statement on the report during the current session would also be permitted to speak on the topic the following year. Everyone would be given full opportunity to express their opinions. In line with the usual procedure, a summary of the debate would be included in the Commission's report on its work at the current session for submission to the General Assembly; similarly, a summary of the debate on the topic at the following session would be included in the corresponding report of the Commission.

Mr. Ouazzani Chahdi said that the discrepancies that had occurred in access by members of the Commission to the different language versions of the sixth report should be avoided in the future.

The Chair said that it was indeed important that the reports of Special Rapporteurs and other documents of the Commission should be made available to members in all the official languages of the United Nations. In the current instance, the Secretariat had gone to considerable lengths to ensure that the Special Rapporteur's sixth report was available in all official languages as soon as possible. In line with the Commission's established practice, the debate on the report had not commenced until the latter had been distributed in all six official languages. In course of that debate, it had been possible for 16 of the Commission's 34 members to make statements.

Ms. Escobar Hernández (Special Rapporteur) said that, because of translation capacity issues, some exceptions to the principle of multilingualism had been made in recent years, but that had not been the case during the current session. As a general rule, reports drafted by Special Rapporteurs were distributed, with the kind help of the Secretariat, on a provisional basis to all members to enable those able to do so to read them. However, no report had been debated until all the official language versions had become available.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VII. Provisional application of treaties (*continued*) (A/CN.4/L.920 and A/CN.4/L.920/Add.1)

C. *Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session*

The Chair invited the Commission to continue its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.920/Add.1, beginning with the commentary to draft guideline 5.

Commentary to draft guideline 5

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Nolte proposed that, in the first sentence, the words "concerns the triggering of" should be replaced with "defines".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to draft guideline 5 as a whole, as amended, was adopted.

Commentary to draft guideline 6

Paragraph (1)

Mr. Nolte said that the paragraph indicated that the source of the binding nature of provisional application was the treaty that was being provisionally applied, rather than the agreement to provisionally apply the treaty. However, the debate within the Commission had not been conclusive in that respect. He therefore proposed the deletion of the paragraph.

Mr. Murphy said that he basically agreed with Mr. Nolte's proposal, but suggested that the first sentence, which was largely descriptive, could be retained, perhaps by moving it to the current paragraph (2).

Mr. Gómez-Robledo (Special Rapporteur) said that he was not comfortable with the deletion of the second sentence, which was factual in nature.

Mr. Park said that he would favour retaining the first and second sentences and deleting the third.

Mr. Nolte said that he could agree to the deletion of only the third sentence.

The Chair said that he took it that the Commission wished to delete the final sentence of paragraph (1).

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte said that, in the first sentence, the word "previous" should be replaced with "general". In the same sentence, the words "or another agreement", which was the usual terminology in that context, should be added after the phrase "subject to the treaty". In the second sentence, the word "default" should be replaced with "presumption". Footnote 34 created the impression that all the treaties mentioned expressed a certain understanding of provisional application, but that was not the case. The treaties cited contained a clause on provisional application, but those clauses did not necessarily mention the effects of such application. He therefore proposed the deletion of words "see" and "which" in the first sentence and "while" in the second sentence so as to make the footnote simply a factual reference to a number of treaties that contained a reference to provisional application.

The Chair, noting the agreement of the Special Rapporteur to Mr. Nolte's proposal, said that he took it that the Commission wished to accept the proposed changes.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood said that, unless they had been included by the Drafting Committee for a specific reason, the words "and to the conduct that is expected from States or international organizations that decide to resort to provisional application" in the second sentence should be deleted since the same point had already been made in the earlier part of the sentence.

Mr. Gómez-Robledo (Special Rapporteur) said that the phrase had been added to provide an explanation for the changes made to draft guideline 6, indicating that provisional application of treaties did not give rise to the full range of effects in the same way as if the treaty were in force and was thus more limited in scope. He had thought it important to allude to the conduct or attitude expected of States or international organizations when they decided to resort to provisional application of a treaty. He thought it useful, if not absolutely necessary, to include the phrase.

On a different point, Mr. Nolte had requested that the word "alludes" in the second sentence should be replaced with "refers". He was prepared to agree to that change, but would like to retain the wording at the end of that sentence that Sir Michael Wood had questioned.

The Chair said that he took it that the Commission wished to amend the paragraph as proposed by the Special Rapporteur.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Murphy said that footnote 35 should be updated to refer to the chapter on subsequent agreements and subsequent practice in relation to the interpretation of treaties in the Commission's report on its work at the current session.

Paragraph (6), as amended, was adopted.

The commentary to draft guideline 6 as a whole, as amended, was adopted.

Commentary to draft guideline 7

Paragraph (1)

Mr. Rajput said that the word "purporting" was used incorrectly and should be replaced with "intending".

Mr. Gómez-Robledo (Special Rapporteur) said that the wording had been reproduced from the definition of "reservation" contained in article 2 of the Vienna Convention on the Law of Treaties; its use had been insisted on during the Drafting Committee discussions.

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

Mr. Murphy said that the wording "invite further examination and discussion" in the second sentence was somewhat unusual, in that it raised the question of who would examine and discuss the rules of the 1969 Vienna Convention. He therefore proposed that the phrase should be replaced with the words "indicate the application of some, but not necessarily all".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Sir Michael Wood said that, in the final sentence, the word "relatively" introduced an inappropriate nuance in English and that the remainder of the sentence dealt with an issue that had been avoided elsewhere, namely the distinction between the treaty that was being provisionally applied and the agreement to provisionally apply the treaty. He proposed that the sentence should be deleted.

Mr. Gómez-Robledo (Special Rapporteur) said that the wording in the Spanish version was clear.

Mr. Nolte said that the problem could be resolved by deleting the word "relatively". The distinction between the treaty that was being provisionally applied and the agreement to provisionally apply the treaty had been mentioned in paragraph (1) of the commentary to draft guideline 6, but the implication of that distinction had not been explained at that point.

Paragraph (5), as amended by Mr. Nolte, was adopted.

Paragraph (6)

Mr. Murphy said that, in the final sentence, the words "law of the international responsibility" were inappropriate and should be replaced with "internal rules"; the reservations that an international organization could make, mentioned in paragraph 2 of the guideline, might in part depend on the organization's internal rules.

Paragraph (6), as amended, was adopted.

The commentary to draft guideline 7 as a whole, as amended, was adopted.

Commentary to draft guideline 8

Paragraph (1)

Mr. Nolte said that, in the second sentence, the words "the application of" should be deleted. In the third sentence, the phrase "would necessarily constitute a wrongful act" should be reworded to read "necessarily constitutes a wrongful act" in order to make the statement stronger. While the information given in the final sentence was important, the second part thereof did not follow automatically from the first. Accordingly, the sentence should be divided into two sentences to read: "Article 73 of the 1969 Vienna Convention states that its provisions shall not prejudge any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly. The scope of the draft guidelines is not limited to that of the two Vienna Conventions, as stated in draft guideline 2."

Sir Michael Wood said the words "is considered as being" should be deleted from the third sentence.

Mr. Murphy said that, in the second sentence, the word "if" seemed to call the legally binding nature of provisional application into question and should be replaced with "since"; the remainder of the sentence should be adjusted to reflect the language of draft guideline 6 so that the first clause of the sentence would read: "Since the treaty or part of the treaty being provisionally applied produces a legally binging obligation,".

Paragraph (1) was adopted with those amendments and minor editorial amendments.

Paragraph (2)

Sir Michael Wood said that the phrase "as conceived under the present draft guideline" was unclear and should be deleted.

Mr. Rajput said that, for the sake of clarity, the words "a breach of" should be inserted between "it is only" and "that part of".

Mr. Gómez-Robledo (Special Rapporteur) said that he could go along with that amendment, which would require the deletion of the phrase "in case of a breach".

Paragraph (2) was adopted with those amendments.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft guideline 8 as a whole, as amended, was adopted.

The meeting rose at 6 p.m.

Provisional

For participants only

25 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3441st meeting
Held at the Palais des Nations, Geneva, on Thursday, 2 August 2018, at 10 a.m.

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Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Please recycle

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VII. Provisional application of treaties (*continued*) (A/CN.4/L.920 and Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.920/Add.1.

Commentary to draft guideline 9 (Termination and suspension of provisional application)

Paragraph (1)

Sir Michael Wood said that, as paragraph 1 of the draft guideline referred to the entry into force of the treaty in the relations between the States or international organizations concerned, it would perhaps be more accurate in the second sentence of paragraph (1) of the commentary to replace the phrase "when the treaty enters into force for the State or international organization concerned" with "when the treaty enters into force between the States or international organizations concerned". The question was not the overall entry into force of the treaty, but rather whether it had entered into force between two States or international organizations.

Mr. Gómez-Robledo (Special Rapporteur) said that, to him, it seemed that the word "for" might allow for a broader interpretation, covering both the entry into force as such and the entry into force for the State.

Mr. Nolte said that his sense was that the word "for" might indeed be more appropriate, as a situation could arise whereby a treaty entered into force provisionally for one State that was then obliged to follow through *vis-à-vis* others that had agreed that the treaty could enter into force under certain conditions that might not yet have been fulfilled for the other States. He would therefore propose retaining the original wording.

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte proposed deleting the word "subjective" in the first sentence. He understood that the Special Rapporteur was referring to the entry into force for that particular State, but that was an objective fact and not something subjective.

Mr. Rajput said that it would be preferable to dispense with the distinction between "objective" and "subjective" entry into force. One solution might be to replace the latter part of the first sentence with the end of the final sentence, to read: "The phrase 'in the relations between the States or international organizations concerned' was included to capture all the possible legal situations that may exist with regard to entry into force under treaties of different types." The second sentence would remain as originally drafted.

Mr. Gómez-Robledo (Special Rapporteur) said that he saw the merit in removing words such as "objective" and "subjective", which might not be sufficiently precise, although their meaning was clear. Concerning Mr. Rajput's proposal, as he recalled, part of the discussion on the phrase "in the relations between the States or international organizations concerned" had centred on "objective" and "subjective" entry into force and not on different types of treaties. A reference to "treaties of different types" might be understood as meaning treaties on different subjects, and would introduce an extraneous issue to the paragraph.

Mr. Rajput said that the reason he had proposed referring to "treaties of different types" was to preface and clarify what was said in the second sentence concerning the phrase "viewed as being particularly relevant in the relations between parties to a

multilateral treaty". As he recalled, the intention had been to capture a broad set of situations by using the words "in the relations between".

Mr. Nolte said that, in order to address the concerns of both Mr. Rajput and the Special Rapporteur, perhaps the second half of the first sentence could be amended to read "was included to distinguish the entry into force of the treaty from the provisional application of the treaty by one or more parties to the treaty", which would make it clear that such a distinction was being made, as explained in the next sentence.

Mr. Gómez-Robledo (Special Rapporteur) said that he would support the proposal made by Mr. Nolte.

Paragraph (3), as amended, was adopted, subject to a minor editorial change.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Nolte said that the middle part of the third sentence — "it was not clear to the Commission that contemporary practice continued to support the narrow language of the Vienna Conventions" — was inappropriate. He therefore proposed amending it to read: "Given the complexity of concluding modern multilateral treaties, all negotiating States or international organizations were to be treated as being on the same legal footing in relation to provisional application and that the existence of other groups ...".

Mr. Gómez-Robledo (Special Rapporteur) said that, although he had no objection to Mr. Nolte's proposal, he wished to share a similar proposal put forward by Mr. Murphy, who did not believe it was appropriate for the Commission to be seen to cast doubt on the text of the Vienna Conventions on the law of treaties. Mr. Murphy had proposed amending the third sentence to read: "Given the complexity of concluding modern multilateral treaties, contemporary practice supports a broad reading of the language of the Vienna Conventions in terms of treating all negotiating States or international organizations as being on the same legal footing …".

Mr. Nolte said that he had no objection to adopting the proposal by Mr. Murphy.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

Mr. Nolte said that he wished to convey a proposal put forward by Mr. Murphy, which he supported. In Mr. Murphy's view, the words "in the case of a material breach" in the second sentence should be deleted, as they unnecessarily restricted what was said in that sentence to the issue of a material breach, whereas other grounds for terminating a treaty should not be excluded.

Mr. Rajput said that he agreed with Mr. Murphy's proposal. In addition, in the fourth sentence, the introductory phrase, "Another conceivable scenario is that in which a State or international organization …", did not make it clear what specifically was being discussed. He therefore proposed replacing the words "in which" with "in situations of material breach" to add clarity.

The Chair said he took it that the Commission wished to adopt the proposals put forward by Mr. Rajput and by Mr. Nolte on behalf of Mr. Murphy.

It was so decided.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Murphy said that, in the first sentence, the words "not only article 60 but also other" should be deleted before "provisions pertaining to termination and suspension".

Paragraph (9), as amended, was adopted.

Paragraph 10

Mr. Rajput said that, as the statement made in the second sentence in relation to the 1986 Vienna Convention not yet having entered into force could have normative implications, the words "should not be referred to in the same manner as its 1969 counterpart" could be replaced with "may not be referred to in the same manner" to avoid expressing doubt about the Convention as a whole.

Mr. Murphy said that Mr. Rajput's proposal would change the meaning somewhat, perhaps unfavourably. Given that the language of the first two sentences had been borrowed and added to paragraph (2) of the commentary to draft guideline 2, if it was changed in the current paragraph it would be necessary to also review it in that paragraph. In his view, the easiest solution might be to delete the second sentence entirely, as the same point had already been made earlier in the commentary. The first and third sentences could then be connected by inserting a comma after "international organizations" followed by the word "but".

Mr. Gómez-Robledo (Special Rapporteur) said that he did not wish to reopen the issue, which had already provoked debate in the Drafting Committee and the Sixth Committee. The European Union had taken a strong stance in favour of qualifying the reference to the 1986 Vienna Convention, and former Commission member Mr. Forteau had also held strong views on the matter. He therefore believed that Mr. Murphy's proposal might resolve the issue.

Mr. Saboia said that he would also support deleting the sentence. Although he had not participated in the discussion on the issue in the Drafting Committee, he considered the proposed formulation inappropriate. Although their binding nature differed, conventions that had been adopted but that had not yet entered into force should not be seen as less important than others.

The Chair said he took it that the Commission wished to adopt the amendment put forward by Mr. Murphy.

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Nolte proposed deleting the second sentence, as it was unnecessary and somewhat misleading, particularly in the light of the Commission's debate and decision on the topic of *jus cogens*, in which it had taken note of a decision of the International Court of Justice finding that certain procedural provisions in section 4 of the 1969 Vienna Convention on the Law of Treaties were customary international law and as such might be applicable to all States. In the last sentence, he proposed replacing the words "the Commission considered invalidity in" with "the Guide addresses invalidity in".

Mr. Gómez-Robledo (Special Rapporteur) said that the paragraph had been drafted prior to the Commission's discussion on the topic of *jus cogens*. Although a number of members had expressed strong views in the Drafting Committee concerning the non-applicability of the procedural provisions contained in section 4 to States that were not parties to the 1969 Vienna Convention, in the light of Mr. Nolte's explanation and the reference to the ruling of the International Court of Justice, he was not opposed to deleting the second sentence.

Paragraph (11), as amended, was adopted.

The commentary to draft guideline 9 as a whole, as amended, was adopted.

Commentary to draft guideline 10 (Internal law of States and rules of international organizations, and the observance of provisionally applied treaties)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Rajput said that he would be interested to know the standard wording used by the Commission when it wished to indicate that certain provisions were to be read in the light of other provisions. As currently drafted, the paragraph indicated that the provision "should be considered together with" article 27 of the 1969 and 1986 Vienna Conventions, which gave the impression that a correlation was being drawn between the paragraph and the article. Perhaps it would be more appropriate to say that it should be "considered in the light of" those articles.

Mr. Cómez-Robledo (Special Rapporteur) said that there was a substantive difference between the formulations "considered together with" and "considered in the light of". From the outset of the project, it had been clear that the primary rules that would shed light on a given provision were the relevant articles of the 1969 and 1986 Vienna Conventions and other applicable rules of international law. In Spanish, he would use the formulation "*tienen que verse en conjunción*" or "*tienen que verse de manera corjunta*".

The Chair said that, as the Special Rapporteur's preferred formulation in Spanish seemed to have been adequately translated as "should be considered together with" in English, if he saw no objection he would take it that the Commission wished to adopt the paragraph as originally drafted.

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte said that he had circulated a proposal in writing concerning the second sentence of paragraph (3), which, as it stood, read: "... draft guideline 10 states that the provisional application of a treaty by a State or international organization cannot, as a general rule, depend on, or be conditioned by, their internal laws or rules." In his view, that sentence was incorrect in a formal sense because the draft guideline did not state that. It was also misleading in a substantive sense because the words "conditioned by" suggested that provisional application could not be limited by internal law, but draft guideline 12 provided for precisely that. The second sentence should more closely track the language of article 27 of the Vienna Conventions and draft guideline 10 and should avoid giving the mistaken impression that parties to a treaty were in any way restricted from agreeing on a limitation of provisional application by their internal law. He proposed that the first sentence should remain unchanged and the second sentence should be amended to read: "Like article 27, draft guideline 10 states, as a general rule, that a State or an international organization may not invoke the provisions of its internal law or rules as justification for its failure to perform an obligation arising under such provisional application." If that modification was accepted, the third sentence could be deleted and the remainder of the paragraph kept as originally drafted. He was concerned about the use of selective quotations from the Guide and believed the Commission should take a cautious approach by quoting the draft guidelines as they were written.

Mr. Gómez-Robledo (Special Rapporteur) said that, as originally drafted, paragraph (3) could never be read in isolation from the rest of the draft guidelines and commentaries. Draft guideline 10 was part of a broader project and, in his view, could not be said to contradict draft guideline 12. However, as draft guideline 10 was perhaps one of the most important provisions of the project, he would be willing to accept Mr. Nolte's proposals if members considered it more appropriate.

The Chair said he took it that the Commission wished to adopt the proposal put forward by Mr. Nolte.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

Mr. Murphy proposed that in the second sentence of paragraph (7), the words "the same legal effect" should be replaced with "a legally binding obligation to apply the treaty or a part thereof", in order to align it with draft guideline 6.

Paragraph 7, as amended, was adopted.

The commentary to draft guideline 10 as a whole, as amended, was adopted.

Commentary to draft guideline 11 (Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Nolte proposed that the beginning of paragraph (3) should be amended to read "Draft guideline 11 provides that", instead of "Draft guideline 11 states that".

Paragraph 3, as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to draft guideline 11 as a whole, as amended, was adopted.

Commentary to draft guideline 12 (Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte said that in the first sentence of paragraph (2), the words "such as obtaining parliamentary consent" should be deleted. The Special Rapporteur had suggested the insertion of an example of limitations to which States might agree with regard to their internal law; however, the sentence gave the impression that obtaining parliamentary consent was a typical example of such limitations, which was not the case. Parliamentary consent was usually a requirement for the final entry into force of a treaty, whereas the usual function of clauses limiting provisional application to domestic law was to refer to particular provisions of internal law that could not be changed immediately and that States therefore agreed should be respected.

In the second sentence, the words "or even" between "rules of the international organization" and "make such provisional application conditional" should be replaced with "and".

With regard to footnote 57, he was unsure whether it was correct to say that the Free Trade Agreements cited contained clauses in which provisional application was made conditional on the non-violation of the internal law of the State. The footnote contained as an example a clause which stated that provisional application was undertaken if constitutional requirements permitted, rather than referring to limitations in substance to the

scope of internal law. It would be helpful if the Secretariat could verify whether the examples given in footnote 57 did indeed relate to the case addressed in draft guideline 12.

Mr. Gómez-Robledo (Special Rapporteur) said that, with regard to the first sentence of paragraph (2), while he agreed that it should not be implied that obtaining parliamentary consent was a typical example and that it could be useful to include additional examples, it would be more appropriate to explain those considerations in footnotes. He would address Mr. Nolte's concern in that regard in a revised proposal to be presented on second reading. In the interim, the words "such as obtaining parliamentary consent" would be deleted.

With regard to footnote 57, while his own interpretation was different from Mr. Nolte's, it could be helpful for the Secretariat to verify the examples given, on the understanding that Mr. Nolte would be consulted on that point before any changes were made.

The Chair said that, with regard to footnote 57, he took it that the Commission agreed that the Secretariat should verify the examples and that the matter would not be brought back to plenary unless errors were found. Paragraph (2) could therefore be adopted on that understanding.

It was so decided.

Paragraph (2), as amended, was adopted on that understanding.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Sir Michael Wood said that paragraph (5) seemed an odd paragraph to include, particularly as the final paragraph of the commentaries. It appeared to constitute almost a policy statement to the effect that guideline 12 should not be taken as intending to encourage States to include limitations. It was not for the Commission to take a position on whether States should or should not include such limitations in their treaties; States were free to draft treaties as they saw fit.

Mr. Nolte said that he shared Sir Michael Wood's concern. Although inserting the words "or discouraging" after "encouraging" could perhaps address that concern, he was of the opinion that paragraph (5) should be deleted.

Mr. Saboia and **Mr. Ruda Santolaria** supported the deletion of paragraph (5).

Mr. Gómez-Robledo (Special Rapporteur) said that while he agreed that paragraph (5) would be awkward as the final paragraph of the commentaries, it was possible that more draft guidelines might be added at a later time. In including the paragraph, his intention had been to reflect the debate that had taken place.

The Chair said he took it that Commission members wished to delete paragraph (5).

It was so decided.

The commentary to draft guideline 12 as a whole, as amended, was adopted.

The commentaries to the draft guidelines on provisional application of treaties, as a whole, as amended, were adopted.

Chapter VII of the draft report as a whole, as amended, was adopted.

Mr. Argüello Gómez said that he wished to place on record that, in his opinion, from a legal perspective it was not logical that a provisionally applied treaty should be accorded the same protection against internal law as a treaty that had been duly ratified. It was important that the draft guidelines should reflect the fact that at least one member was not entirely satisfied with the position set out therein with regard to the effect of internal law.

The Chair said that the position of Mr. Argüello Gómez had been noted and would be taken into account on second reading.

Chapter V. Identification of customary international law (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to consider the portion of chapter V of its draft report contained in document A/CN.4/L.918.

A. Introduction

Paragraph 1

Mr. Murphy said that in footnote 1 to paragraph 1, the words "At its" at the beginning of the first sentence should be replaced with "See". With regard to the second sentence, it was likely that the Commission had not had a note before it at the meeting on 22 May 2012. In addition, the chronology laid out in the third and fourth sentences was somewhat confusing.

Sir Michael Wood (Special Rapporteur) said that the second sentence of footnote 1 could be deleted.

Paragraph 1, as amended, was adopted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted, subject to their completion by the Secretariat.

Paragraph 10

Paragraph 10 was adopted.

C. Recommendation of the Commission

Paragraph 11

Paragraph 11 was left in abeyance.

D. Tribute to the Special Rapporteur

Paragraph 12

Paragraph 12 was left in abeyance.

E. Text of the draft conclusions on identification of customary international law

1. Text of the draft conclusions

Paragraph 13

Paragraph 13 was adopted.

The Chair invited the Commission to consider the portion of chapter V contained in document A/CN.4/L.918/Add.1.

E. Text of the draft conclusions on identification of customary international law

2. Text of the draft conclusions and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Identification of customary international law

General commentary

Paragraphs (1) and (2)

Sir Michael Wood (Special Rapporteur) proposed that the order of paragraphs (1) and (2) should be reversed so that paragraph (1) would mirror paragraph (1) of the general commentary to the Guide to Provisional Application of Treaties, as adopted by the Commission.

Paragraphs (1) and (2) were adopted on that understanding.

Paragraph (3)

Mr. Park said that since the term "*opinio juris*" appeared for the first time in the document in paragraph (3), footnote 7 should be moved to that paragraph from its current location in paragraph (1) of the commentary to draft conclusion 2.

Mr. Nolte said that in the second sentence, the words "and can be an effective means for subjects of international law to regulate their behaviour" should be deleted, since they could give rise to the misunderstanding that customary international law could also be an ineffective means.

Mr. Murphy said that if Mr. Nolte's proposal was taken up, it would be preferable to combine the first and second sentences into one, so as to avoid having two short sentences.

Mr. Nolte said that he liked short sentences if they conveyed clear messages, as was the case in that instance.

Sir Michael Wood (Special Rapporteur) said that, in his opinion, it was preferable to retain the two short sentences, including the word "remains", which emphasized the continuing importance of customary international law.

The Chair said he took it that the Commission wished to take up Mr. Park's proposal and Mr. Nolte's proposal to delete words in the second sentence. The first and second sentences of the paragraph would not be combined into one.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Park said that, in the last sentence of paragraph (5), the word "rule" should be deleted after the words "persistent objector". The word "rule" had not been mentioned in that context during the discussions of the Working Group on identification of customary international law earlier in the current session. If the Special Rapporteur's intention in that sentence had been to reflect the titles of draft conclusions 15 and 16, then the deletion was necessary.

Mr. Vázquez-Bermúdez said that he supported Mr. Park's proposal. In addition, the word "usually" should also be deleted from the sixth sentence, since the idea being

expressed was that two specific cases constituted exceptions to the binding nature of customary international law. The word "usually" might therefore create problems of interpretation.

Mr. Murphy said that the term "persistent objector rule" also appeared in paragraph (4) of the commentary to draft conclusion 15. Furthermore, paragraph (1) of the commentary to draft conclusion 15 stated that the concept was "sometimes referred to as the persistent objector 'rule' or 'doctrine'". On that basis, if Mr. Park was proposing that the word "rule" be deleted in every instance in the document where it occurred after "persistent objector", he himself would persistently object to that proposal.

Ms. Oral said that she would not be comfortable with making the change proposed by Mr. Park systematically throughout the document.

Mr. Park said that he objected to the use of the word "rule" in paragraph (5) only, since the Special Rapporteur had changed his position after the Working Group's discussions.

Sir Michael Wood (Special Rapporteur) said that he accepted Mr. Park's proposal. While he did not object to the deletion of the word "usually", it was important to make clear in the text that customary international law was universally binding with the exception of the questions addressed in Part Six and Part Seven of the draft conclusions.

In addition, in the part of the sixth sentence that appeared within brackets, the words "of customary international law" should be inserted after the word "rules".

Paragraph (5), as amended, was adopted.

The general commentary to the draft conclusions on identification of customary international law, as a whole, as amended, was adopted.

Part One (Introduction)

The chapeau of Part One was adopted.

Commentary to draft conclusion 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Vázquez-Bermúdez proposed that the last sentence in footnote 5 should be deleted, in the light of the statement, in paragraph (6) of the commentary to draft conclusion 1, that no attempt was made to explain the relationship between customary international law and other sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice.

Paragraph (3) was adopted, with an amendment to footnote 5.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted with a minor editorial change.

Paragraph (6)

Mr. Nolte said that in order to make clearer that the last sentence in paragraph (6) dealt with two distinct issues — customary international law within national legal systems and the burden of proof — he proposed splitting it into two. The new penultimate sentence would begin with the word "Fourth", rather than "Finally", and end after the words "national legal systems", and the new last sentence would read: "Finally, the draft

conclusions do not deal with the general question of a possible burden of proof of customary international law."

Sir Michael Wood (Special Rapporteur) said that he was in agreement with the proposal made by Mr. Nolte, except that instead of the phrase "do not deal with the general question of a possible burden of proof", he would prefer "do not deal in general terms with the question of a possible burden of proof".

Paragraph (6), as amended, was adopted.

The commentary to draft conclusion 1 as a whole, as amended, was adopted.

Part Two (Basic approach)

The chapeau of Part Two was adopted.

Commentary to draft conclusion 2 (Two constituent elements)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted with a minor editorial change.

Paragraph (3)

Mr. Tladi noting that the Commission's practice was to refer not to the "Colombian/Peruvian asylum case", but simply the "*Asylum case*", in line with the official citation given by the International Court of Justice in its Judgment, said that the reference should be corrected throughout the report.

Mr. Petrič said that the Commission would perhaps need to discuss what practice it wished to adopt with regard to the citation of cases. The practice of the International Court of Justice itself had changed over time; now the official citation given by the Court necessarily included the title of the case.

Sir Michael Wood (Special Rapporteur) said that, to date, only one "*Asylum case*" had been adjudicated in the International Court of Justice; therefore, he would not be opposed to retaining the official citation with "*Asylum case*" after the first time it appeared in the report. In fact it was better to do what the Court itself did.

The Chair suggested entrusting the Secretariat with making any necessary amendments to the citation of the case.

Paragraph (3) was adopted on that understanding.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

Mr. Tladi proposed deleting the second part of the second sentence of the paragraph, beginning with the words "and is not divided", as he was not certain its content was correct.

Sir Michael Wood (Special Rapporteur) said that given that the first sentence of the paragraph was the most important one, he would be willing to accept Mr. Tladi's proposal.

Mr. Nolte said that he could have supported Mr. Tladi's proposal had the second sentence originally ended after the words "and is not divided into separate branches"; however, the phrase that followed — "each with its own approach to sources" — was an integral part of the point being made by the Special Rapporteur. It did not mean that there were not different branches of international law, but rather that there were not different sources for each branch, a statement with which he agreed.

Mr. Tladi said that the interpretation put forward by Mr. Nolte, which was one reading of the second sentence, was already reflected elsewhere in the report; for that reason and because the sentence could be misleading for some readers, he would still prefer to delete the second part thereof.

Mr. Nolte said that a solution that took into account the concern expressed by Mr. Tladi might be to rephrase the second part of the sentence so that it read "and is not divided into separate branches with their own approach to sources", to make clear that the different branches of international law did not have their own approach to sources.

Mr. Murphy said that he supported the proposal made by Mr. Nolte.

Paragraph 6, as amended by Mr. Nolte, was adopted.

The commentary to draft conclusion 2 as a whole, as amended, was adopted.

Commentary to draft conclusion 3 (Assessment of evidence for the two constituent elements)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Sir Michael Wood (Special Rapporteur) suggested that reference should be made to the recent judgment of the United Kingdom Court of Appeal in *Freedom and Justice Party v. Secretary of State for Foreign and Commonwealth Affairs*, and that footnote 19 seemed the most appropriate place for such a citation.

The Chair suggested that the Secretariat should be entrusted with making the necessary amendment to footnote 19.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Tladi proposed deleting the second sentence of the paragraph, as he was not certain that it was accurate. For example, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, which had related precisely to the prohibition of torture, the International Court of Justice had sought to identify affirmative State practice.

Mr. Nolte proposed that, in the second sentence, the word "deliberate" should be deleted, as its use in defining "inaction" here was inappropriate. It was very difficult to prove that States deliberately did not take action; it should be sufficient to require that States were conscious of their inaction. The issue, moreover, was not one that should be dealt with in the current paragraph, since, as pointed out in footnote 22, it would be explained further in paragraph (3) of the commentary to draft conclusion 6. He therefore proposed that it was sufficient to refer simply to "inaction" and to point out where the term would be explained further. He reserved his position as to the use of the word "deliberate" in the commentary to draft conclusion 6. Moreover, he did not support the proposal by Mr. Tladi, because the phrase in parentheses was very important: it was the difference between prohibitive rules and other rules. The attention of those that applied customary international law should be drawn to that distinction by that very formulation.

Mr. Murphy, agreeing with Mr. Nolte that the second sentence was too important to delete, said that in his view that sentence highlighted that the nature of the rule was significant when looking for evidence. One of the most important areas where the nature of the rule might well dictate whether there was action or inaction was a prohibitive rule, as in

the prohibition of torture. Therefore, it was useful to highlight it for those trying to assess whether they had evidence that allowed for the identification of an existing rule.

He did not agree with Mr. Nolte that the word "deliberate" should be deleted; as he recalled, during its debate on the draft conclusions themselves, the Commission had agreed that it was an important aspect of the concept of inaction. Member States had expressed concern that mere inaction might be deemed as tantamount to action and had stressed that it should be made clear that it was inaction on the basis of a deliberate process by the State. The Commission had also decided that while it would not include the word "deliberate" in the draft conclusions themselves, it could do so in the commentary thereto. Therefore, he would prefer to retain the word "deliberate" in paragraph (4), although he would not be opposed to deleting the text "(for example, the prohibition of torture)".

Mr. Tladi said that, if the second sentence was retained, it would be helpful for it to be explained, particularly in the light of the example that was given therein, namely the prohibition of torture. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice had been able to find affirmative State practice concerning a prohibitive rule. The distinction that was drawn in the sentence appeared to be based on an understanding of conduct as being limited to conduct "on the ground". Yet, in draft conclusion 6, the definition of conduct was broad and included legislation and case law, among other things. Consequently, he was concerned that the sentence was inaccurate and, while he would not stand in the way of its retention, he would prefer to see it clarified further.

Mr. Hmoud said that he agreed with the proposal to delete the word "deliberate", which created confusion between inaction as mandated by law and inaction as conduct.

Mr. Grossman Guiloff said that he also agreed with the proposal to delete the word "deliberate". In the case of torture, it was not at all difficult to find affirmative State practice. It would thus be advisable to remove the reference to the prohibition of torture in the second sentence.

Mr. Park said that he, too, agreed with the proposal to delete the word "deliberate", which the Commission had, in the first part of the session, discussed in relation to the text of draft conclusion 6, before ultimately deciding not to include it there.

Mr. Murphy asked whether those members who supported the deletion of the word "deliberate" would also seek to remove any trace of it from paragraph (3) of the commentary to draft conclusion 6, in which the Commission was trying to explain what type of inaction was probative.

Mr. Nolte said that the reference to the prohibition of torture was perhaps unnecessary and could be omitted. Regarding the possible deletion of the word "deliberate" in paragraph (3) of the commentary to draft conclusion 6, the Commission should adopt a paragraph-by-paragraph approach. It would, at some point, need to explain what "inaction" meant, and the distinction between "deliberate" and "conscious".

Mr. Tladi said that his issue with the second sentence was not the reference to the prohibition of torture, but that the sentence as a whole was inaccurate, as it failed to take into account the wide variety of forms of conduct that existed. While, with conduct "on the ground", it was clearly more difficult to find much affirmative State practice, that was not the case with other forms of conduct, even where prohibitive rules were concerned. It was disappointing that the Commission did not seem minded to clarify the sentence.

Mr. Nolte said that one way of addressing Mr. Tladi's concern might be to insert the word "sometimes" after "it may".

Sir Michael Wood (Special Rapporteur) said that, taking into account all the comments and proposals from members, the second sentence should be redrafted to read: "In particular, where prohibitive rules are concerned, it may sometimes be difficult to find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law."

The Chair said that the deletion of the word "deliberate" did not necessarily mean that the word would be removed from later paragraphs of the commentary.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

Mr. Vázquez-Bermúdez said that, in the first sentence, the words "*opinio juris*" should be inserted, in parentheses, after "acceptance as law".

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to draft conclusion 3 as a whole, as amended, was adopted.

Part Three (A general practice)

The chapeau of Part Three was adopted.

Draft conclusion 4 (Requirement of practice)

Mr. Murphy said that, in the first paragraph of the draft conclusion, the word "to" was missing after "primarily".

The Chair said that the Secretariat would make that editorial correction.

Commentary to draft conclusion 4 (Requirement of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte asked why a reference to the Commission's work on the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties" had been removed from footnote 27.

Sir Michael Wood (Special Rapporteur) said that he saw no need to go into too much detail in a footnote whose purpose was simply to make clear that State practice was relevant in other contexts.

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte said that, to avoid implicitly downgrading the content of draft conclusion 4, the second sentence should track more closely the language of paragraph 2 thereof. He therefore proposed that the words "may be relevant in this context" should be replaced with "contributes to the formation, or expression, of rules of customary international law".

Mr. Hmoud said that, to be completely faithful to the language of paragraph 2, the words "in certain cases", set off in commas, should be included before the word "contributes".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Park said that, in footnote 29, no source was provided for the definition of the term "international organizations". He asked what that source was and recalled that, in the first part of the session, he had proposed that the Commission should draw on article 2 (a) of its 2011 articles on the responsibility of international organizations.

Sir Michael Wood (Special Rapporteur) said that the definition had been drafted by members of the Commission during its consideration of the topic. The purpose of the footnote was to warn non-experts that reference was being made to public or intergovernmental international organizations, and not to non-governmental organizations.

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez said that, as it stood, the last sentence limited the role or contribution of international organizations. He therefore proposed replacing the words "when serving as treaty depositaries" with "when concluding treaties, serving as treaty depositaries".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Sir Michael Wood (Special Rapporteur) proposed that, for the sake of clarity, in the first sentence, the word "NGOs" should be inserted, in parentheses, after "non-governmental organizations".

Mr. Murphy said that footnote 34 contained a reference to the Commission's work on the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties". The Secretariat should ensure uniformity in the manner in which such references were handled in the footnotes.

Paragraph (8), as amended, was adopted on that understanding.

Paragraph (9)

Sir Michael Wood (Special Rapporteur) proposed that, in footnote 36, the words "1949 Geneva Conventions for the protection of war victims" should be replaced with "Geneva Conventions for the protection of war victims of 12 August 1949". The aim was to make clear that the words "for the protection of war victims" were part of the generic title often used to refer to the four Geneva Conventions, rather than somehow limiting the role of the International Committee of the Red Cross (ICRC).

Mr. Saboia asked why, in footnote 36, reference was made only to the 1949 Geneva Conventions and not, for example, to the protocols additional thereto, which also assigned functions to ICRC, and whether the mention of "war victims" was sufficient to cover civilians and other categories of protected persons.

Sir Michael Wood (Special Rapporteur) said that the title containing a mention of war victims was the designation used by ICRC on its website to refer to all four of the Geneva Conventions. On the question of specific functions, in 2016, he had discussed the footnote with representatives of ICRC, who were content with the wording chosen.

Paragraph (9), as amended, was adopted.

The commentary to draft conclusion 4 as a whole, as amended, was adopted.

Commentary to draft conclusion 5 (Conduct of the State as State practice)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Murphy said that he would prefer to redraft footnote 39 to read: "In the case of particular customary international law, the practice must be known to at least one other State or a group of States (see draft conclusion 16, below)."

Mr. Park proposed the insertion of the word "concerned", which was used in draft conclusion 16, after "group of States" in Mr. Murphy's proposed wording.

Sir Michael Wood (Special Rapporteur) said that the last part of the footnote should then read "at least one other State or group of States concerned (see draft conclusion 16, below)".

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 5 as a whole, as amended, was adopted.

The meeting rose at 12.55 p.m.